Supreme Court, U.S.
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No. 91-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABIGAIL RUTH MARSHALL
and DONALD BERGERSON

Petitioners,

vs.

SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES;DAVID AND JOYCE OWEN; STANLEY MARSHALL; CASSANDRA MARSHALL,

Respondents,

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First District, Division Three, (Cal. App. Nos. A049823; S023606)

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do "fit" near-relatives have a constitutional preference (over a state-created foster family) for obtaining custody of a minor who has been declared a dependent child of the juvenile court?

2. If so, can the state, over objection by such relatives and the child's father, constitutionally place the minor for adoption by strangers as opposed to guardianship by relatives who would preserve family bonds?

3. When a child has been taken from a natural father solely because the father is incarcerated, does the father have a right to nominate fit near-relatives to take custody of the child so as to preserve that child's religious heritage and family bonds?

4. What are the minimum requirements of procedural due process necessary to insure that near-relatives are able to avail themselves of a legislatively expressed preference that dependent children *should* be placed with them?

TABLE OF CONTENTS

Questions Presented	i
Table of Cases and Authorities	iii
Parties	1
Opinions Below	1
Jurisdiction	2
Constitutional Provisions	2
Statement	3
Reasons for Granting Certiorari:	
Certiorari Should Be Granted to Resolve Whether Families Have the Constitutional Power to Stop The State From Placing Children With Strangers for Purposes of Adoption, Rather Than With Near-Relatives For Purposes of Preserving Cultural Heritage and Family Bonds	7

TABLE OF CASES AND AUTHORITIES

Cases

Backlund v. Barnhart 778 F.2d 1386 (9 Cir., 1985) 13
Cleveland Bd. of Educ. v. La Fleur 414 U.S. 632 (1974) 8
Drollinger v. Milligan 552 F.2d 1220 (7 Cir., 1977) 9
Drummond v. Fulton County Dept. Fam. and Children's Services 563 F.2d 1200 (5 Cir., *en banc* 1977), *cert. den.* 437 U.S. 910 13
Gibson v. Merced County Dept. Human Resources 799 F.2d 582 (9 Cir., 1986) 13
In re Aaron S. 228 Cal. App. 3d 202 (1991) 4
In re Baby D. 208 Cal. App. 3d 1489 (1989) 12
In re Jessica Z. 225 Cal. App. 3d 1489 (1990) 12
In re Terry E. 180 Cal. App. 3d 932 1986) 7
Kyees v. County Dept. Pub. Works 600 F.2d 693 (7 Cir., 1979) 13
Lipscomb ex.rel. deFehr v. Simmons 884 F.2d 1242 (9 Cir., 1989) *rhg. en banc gn'd* 907 F.2d 114 (1990) 9
Meyer v. Nebraska 262 U.S. 390 (1923) 6,9
Moore v. East Cleveland 431 U.S. 496 (1977) 6,9,13
Pierce v. Society of Sister 268 .S. 510 (1925) 6,9
Prince v. Massachusetts 321 U.S. 158 (1944) 9
Rivera v. Marcus 696 F.2d 1016 (2 Cir., 1982) 9
Sherard v. Owens 484 F.Supp. 728 (W.D., Mich., 1980) *aff'd* 644 F.2d 542, *cert. den.* 454 U.S. 828 13
Smith v. Org. of Foster Families for Educ. and Reform 431 U.S. 816 (1977) 6,7,12,13
Stanley v. Illinois 405 U.S. 645 (1972) 11
Trujillo v. Bd. of County Comm. 768 F.2d 1186(10 Cir., 1985) 9
Wilder v. Bernstein 848 F.2d 1338 (2 Cir., 1988) 9
Wisconsin v. Yoder 406 U.S. 205 (1972) 6,9

Constitutions

U.S. Constitution Amend. I 2

U.S. Constitution Amend. IV 2
U.S. Constitution Amend IX 2
U.S. Constitution Amend XIV 2

Statutes

Ca. Welf. and Institutions Code section 202(a) 9
Ca. Welf. and Institutions Code section 281.5 10
Ca. Welf. and Institutions Code section 300(g) 4
Ca. Welf. and Institutions Code section 319 10
Ca. Welf. and Institutions Code section 361.3 11
Ca. Welf. and Institutions Code section 366.25(d) 10
Ca. Welf. and Instituitons Code section 366.25(g) 4
Ca. Welf. and Institutions Code section 366.26(c) 10
Ca. Welf. and Institutions Code section 366.26(j) 4
Ca. Welf. and Institutions Code section 388 12
28 U.S.C. 1257(a) 2 2
28 U.S.C. 2043(b) 1

Authorities

Beyer and Mlyniec, "*Lifelines to Biological Parents: Their Effect on Termination of Parental Rights*," 20 Fam. L. Q. 233 7
Committtee for the Family, Group for Adv. of Psychiatry, *New Trends in Child Custody Disputes 80-81* 2 Int. J. Fam. Therapy 176 8
Davis, "*Use and Abuse of the Power to Sever Family Bonds* 12 N.Y. Rev. L. & Soc. Change 557 13
Stack, "*Cultural Perspectives on Child Welfare* 12 N.Y. Rev. L. and Soc. Change 539 7
Stolberg, "*Foster Care Rules Left Out*" *Los Angeles Times* Nov. 30, 1991 8
Symposium: *The Impact of Psychological Parenting on Child Welfare Decision-Making* 12 N.Y.Rev. L. & Soc. Change 485 12,13

No. 91-—

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABIGAIL MARSHALL, *et. al., Petitioners,*

vs.

DEPARTMENT OF SOCIAL SERVICES, *et. al., Respondents,*

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal of California,
First Appellate District, Division Three

PARTIES

The parties to the proceeding in the appellate and Supreme Courts of California were petitioners, Abigail Marshall and Donald Bergerson, the paternal aunt and uncle of Cassandra Marshall; Stanley Marshall, Cassandra's father; Cassandra; the San Francisco Department of Social Services, which has custody of Cassandra; and Joyce and David Owen, the state foster family with whom Cassandra has been placed.[1]

OPINIONS BELOW

The decision of the Court of Appeal is annexed as App. 1. The order by the Supreme Court of California denying discretionary review is annexed as App. 2.

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1. The foster family filed no brief in the appellate court, but was listed by that court as a party to its decision, and hence is a respondent here. Also, while Cassandra's *mother* was not a party to the appellate decision, she has been served with copies of this petition. Finally, 28 U.S.C. 2403(b) may apply hereto, and service has been made on the Attorney General of California.

JURISDICTION

On December 18, 1991, the California Supreme Court entered an order denying review and thereby affirming a judgment which, as appears, poses a substantial Federal question. Jurisdiction is conferred on this Court pursuant to *28 U.S.C. 1257(a).*

CONSTITUTIONAL PROVISISIONS

Petitioners rely on the following constitutional provisions:

1. The *First Amendment* to the Constitution, which provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The *Fourth Amendment* to the Constitution, which provides that "[t]he right ot the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

3. The *Ninth Amendment* to the Constitution, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. The *Fourteenth Amendment* to the Constitution, which provides that "(1) All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ...."

STATEMENT

This is an appeal from denial of a motion by petitioners to obtain custody of their niece, Cassandra Marshall.

Cassandra was born in September of 1988 to a drug-addicted mother and an incarcerated father. Neither of Cassandra's parents could care for her, but her father *arranged* for her care by asking his sister and her husband, petitioners here, to raise Cassandra on his behalf. Petitioners agreed to do so. They did not seek financial compensation, but rather hoped that their commitment would allow Cassandra to preserve loving ties to her natural family and to be exposed to the Jewish religion to which petitioners and Cassandra's father adhere. (Tr. 404; App. 1 at pages 3-4)

However, the local Department of Social Services had plans of its own. The Department detained Cassandra at birth and placed her in a series of two foster homes a considerable distance from petitioners' home. Both foster care providers were unrelated to Cassandra and took her (and other children) into their homes on a temporary basis, for money. (Tr. IV:62-63) Although placement in foster care was initially justified by the Department as related to Cassandra's health,--(Cassandra had withdrawal symptoms at birth and the foster placements were with nurses),--the social worker admitted at trial that she "dragg[ed her] feet" (Tr. 110) in moving Cassandra long after the child had recovered from any possible illness.

Around the time that it detained her, the Department filed a petition to have Cassandra made a "dependent" of the juvenile court. A finding of dependency is a condition precedent under California law for the eventual termination of the rights of unfit parents and the placing of a child for adoption. Cassandra's father objected to the finding of dependency, protesting that his sister and her husband were available to take the child (which need not thus become a ward of the court). His objection was overruled; dependency was declared; and Cassandra

remained in foster care.[2] (Tr. 9-10; App. 1 at page 10)

During the ensuing year, petitioners repeated their request to raise Cassandra. (*E.g.*, App. 1 at pages 4-5) The Department conceded that petitioners could provide Cassandra with a "fit" home,--(an inevitable concession in that petitioners are both licensed attorneys; own a house; have been married for ten years; and have two healthy children),--but the Department never got around to making the move. The Department *did* initiate overnight "preplacement" visits between Cassandra and her relatives, (which raised "no noticiable concerns" (Tr. 64) on part of the social worker assigned to the case), but the move *still* did not occur.

California law requires that a permanent home be found for a dependent child after twelve (or, at most, eighteen) months, and the preference is for keeping the child in the present foster placement if he or she has been there for any substantial period of time. *California Welfare and Institutions Code section 366.25(g); see,* also, *section 366.26(j).* Lest Cassandra remain in foster placement by default, petitioners filed a petition requesting that the juvenile court *order* Cassandra moved to their home.

Meanwhile, the relationship between the foster family and petitioners deteriorated. Petitioners, who had sought custody of Cassandra for *inter alia,* the purpose of raising her in the Jewish faith, were alarmed when the foster mother "dedicated" Cassandra to be raised in the Penatcostal sect to which the foster family belonged, and told petitioners it was important that Cassandra be raised in a "good Christian home." (Tr. 413-414, 812, 831, VI:

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2. *After* the above-referenced hearing in the instant case, the law in California changed. Under the amended law, the juvenile court could not establish jurisdiction over a child such as Cassandra solely on grounds that the father was incarcerated. *In re Aaron S.* 228 Cal. App. 3d 202, 278 Cal. Rptr. 861 (1991); *California Welfare and Institutions Code section 300(g),* effective January 1, 1989.

83-86) The foster family later expressed personal distaste for petitioners (Tr. 811, 815, 842) and resisted visitation between them and Cassandra. Ultimately, the foster family announced its decision to adopt Cassandra.

The Department opposed petitioners' request for custody. The Department relied primarily on testimony from a psychologist who was of the opinion that the foster parents were Cassandra's "psychological parents" from whose home it would be damaging to move a child of eighteen months of age after a year of residence. (Tr. 263, 272-277, 282, 288-292, 297-299; App. 1 at pages 5-6) In addition, the Department's social worker claimed that on several occasions petitioners had equivocated in their demands for custody and had explored placing Cassandra in homes other than theirs. Petitioners' witnesses attested to the consistency of petitioners' custody requests, and their psychiatrist testified that the Department's "psychological parenting" theory was not scientifically valid. (Tr. 379-504, 602-762, 795-865; Tr. V; App. 1 at page 6)

Petitioners lost their case in the trial court. California law has no substantive presumption favoring placement of a dependent minor with near-relatives. Relatives must petition the court like any other claimant and prove it is in the minor's "best interest" to live with them; because relatives lack a substantive "preference," should the Department favor an alternative custodian, the relatives must show that there is something *wrong* with the Department's choice before they can satisfy the burden of showing that *they* are "best." By the time that the petition was finally heard, this was too heavy a burden for petitioners to shoulder.

At *all* stages of these proceedings[3], petitioners

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3. Petitioners filed a lengthy constitutional brief in the trial court, (R. II), and their appeal briefs were predicated almost entirely on Federal Constitutional analysis, as was their petition for review in the State Supreme Court.

maintained that they had a custodial preference as a matter of Constitutional law. The Constitution protects extended family units, [*Moore v. East Cleveland* 431 U.S. 496 (1977)], and family-based religious traditions, [*Wisconsin v. Yoder* 406 U.S. 205 (1972)], from unwarranted intrusion by the state. Moreover, *parents* have a right to direct, through surrogates if necessary, the upbringing of their children in a chosen way, [*Meyer v. Nebraska* 262 U.S. 390 (1923); *Pierce v. Society of Sisters* 268 U.S. 510 (1925)], and Cassandra's father had nominated petitioners as his surrogates here. By contrast, the rights, *if any,* of state-created foster families are far more limited than those originating with biological ties. *Smith v. Organization of Foster Families for Education and Reform* (hereafter "*Smith v. O.F.F.E.R.*") 431 U.S. 816, 844, 846-847 (1977). Combining these concordant strains of constitutional doctrine, petitioners reasoned that "fit" near-relatives have a preference over state-created foster families for custody of dependent minors.

The trial court rejected petitioners' constitutional arguments without comment.[4] The judgment of the trial court was affirmed on appeal; although it noted at oral argument that this case epitomized numerous similar tragedies, the appellate court held that relatives "have no constitutional claim giving them preferential rights to" a dependent minor, (App. 1 at page 15), and that the state can, for no particular reason, permissibly delay relative-placement from birth through permanency planning, at which point [t]he fact that ... [the state] had the opportunity, at a previous time, to place the minor with relatives becomes irrelevant." (App. 1 at page 17). The California Supreme Court, without comment, refused to hear the case. (App. 2) This petition followed.

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4. The trial court commented only on the *statutory* preference which, it held, did not apply because the court intended to order an adoption, at which point the foster parents, as current caregivers, would have a preference.

REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER FAMILIES HAVE THE CONSTITUTIONAL POWER TO STOP THE STATE FROM PLACING CHILDREN WITH STRANGERS FOR PURPOSES OF ADOPTION, RATHER THAN WITH NEAR-RELATIVES FOR PURPOSES OF PRESERVING CULTURAL HERITAGE AND FAMILY BONDS

It is common knowledge that the number of neglected or abandoned children is growing. The epidemic of drug dependency and a generation of economic stagnation has strained the bonds of families already weakened by a generalized loosening of moral restraints and an enervating dependency on welfare.

Unfortunately, neglected children sometimes suffer additional blows from the system which is chartered to protect them. One common source of such harm is the "deep antifamily bias," [Beyer and Mlyniec, "*Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence,*" 20 Fam. L. Q. 233, 239 (1986)], held by "social workers of middle class backgrounds [who], perhaps unconsciously, incline to favor ... placement [of dependent children] in foster care with a generally higher-status family rather than return the child to his natural family." *Smith v. O.F.F.E.R., supra,* 431 U.S. at 834; Stack, "*Cultural Perspectives on Child Welfare,*" 12 N.Y. Rev. L. and Soc. Change 539, 545 (1984). As a result of this "'mind set' to place ... children for adoption [with non-relatives] as soon as possible," [*In re Terry E.* 180 Cal. App. 3d 932, 946, 225 Cal. Rptr. 803 (1986)], children are placed with strangers who are often jealous of and hostile towards the child's *biological* family. When, as here, near-relatives would, *themselves,* have been willing to raise the child, the consequences are tragic; not only are the relatives denied the opportunity to repair bonds of kinship strained by whatever it was that caused the child's parents to neglect her in the first

place, but the *child* is denied an opportunity to nurture a self-image based on a concept of *intrinsic* biological worth.[5]

Whatever its cause and ultimate impact, the tendency to place dependent children with non-relative foster care providers as opposed to "fit" and interested relatives is constitutionally impermissible.

Near-relatives enjoy a due-process right (against the state) to configure an "extended family," and parents enjoy First and Fourteenth Amendment freedom to direct the upbringing of their young; both the parents and relatives enjoy a Fourth Amendment protection against unwarranted seizures of kin. When these rights coalesce, as here, in an absent parent's request that his child be raised by relatives so as to preserve family ties and religious heritage, the state has no legitimate power to intrude, as appears more fully below.

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"[F]reedom of personal choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. La Fleur* 414 U.S. 632, 639-640 (1974). There is a protected "private realm of family life which the state cannot enter." *Prince v. Massachusetts* 321

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5. Such loss of self-esteem is never trivial, [*see, e.g.*, Committee on the Family, Group for the Advancement of Psychiatry, *New Trends in Child Custody Disputes 80-81*" 2 Int. J. Fam. Therapy 176 (1980)], but sometimes the tragedy of non-relative placement is even more tangible, such as in the case of the foster child who was beaten to death by foster parents after his aunt was denied placement. Stolberg, "*Foster Care Rules Left Out Family, Tragedy Followed; Boy's Death Raises Issue of 'Kinshp Care' as Alternative to Placing Neglected Youngsters With Strangers,*" *Los Angeles Times* Saturday, November 30, 1991.

U.S. 158, 166 (1944). This protection does not extend merely to traditional nuclear families; equally protected is the practice born "[o]ut of choice, necessity, or a sense of family responsibility, ... for close relatives to draw together and participate in the duties and the satisfactions of a common home .... [T]he choice of relatives of this degree of kinship to live together cannot lightly be denied by the state." *Moore v. City of East Cleveland, supra,* 431 U.S. at 505-506. Although *Moore* was a zoning case, the right described by it is not restricted to the context of zoning disputes. Rather, the "extended family" rights recognized in *Moore* have been recognized in a variety of contexts in the federal courts, including dependency law. *Rivera v. Marcus* 696 F.2d 1016, 1022 (2 Cir., 1982); *see, Drollinger v. Milligan* 552 F.2d 1220, 1226-1227, fn. 6 (7 Cir., 1977); *Trujillo v. Board of County Commissioners* 768 F.2d 1186, 1189 (10 Cir., 1985); *see,* also, *Lipscomb ex. rel. deFehr v. Simmons* 884 F.2d 1242 (9 Cir., 1989), rhg. *en banc.,* gn't., 907 F.2d 114 (1990). These progeny of *Moore* recognize that the right to *configure* an extended family is fundamental, *i.e.,* any restriction on it cannot stand unless supported by a compelling state need. *Moore, supra,* 431 U.S. at 506.

As indicated, *Moore* is complemented by the doctrine that *parents* have the right to make fundamental religious and educational choices on behalf of their young children. *Wisconsin v. Yoder, supra,* 406 U.S. 205; *Meyer v. Nebraska, supra,* 262 U.S. 390; *Pierce v. Society of Sisters, supra,* 268 U.S. 510. This parental right does not evaporate merely because the child is a temporary dependent of the juvenile court; the state is *still* under a duty to make reasonable efforts to provide a home with values as nearly equivlant to those of the parental home as possible. *See, Wilder v. Bernstein* 848 F.2d 1338, 1348 (2 Cir., 1988); *California Welfare and Institutions Code section 202(a).* Here, Cassandra's father sought to exercise his right to direct the upbringing of his daughter by requesting that she be placed in the home of his sister; his request gained added constitutional luster because one *reason* for it was his desire that Cassandra be raised according to his religious beliefs. The state bears a heavy "burden of justification" when seeking to impair or

impede a choice of this nature.

Concededly the state *has* a compelling interest in protecting the well-being of minor children, but that interest does not encompass the *invention* by the state of artificial "families" charged with the mission of "fostering" children whose biological kin are perfectly willing and able to nurture such children on their own. Yet California law does just that.

California works its mischief in three ways.

First, under California law, *adoption,* even if by strangers, is statutorily preferred to "guardianship," even if by near-relatives, [*California Welfare and Institutions Code sections 366.25(d); 366.26(c)*]; relative-placement tends to frustrate this normative goal since the whole *point* of placing a child with relatives is to *preserve,* rather than to sever family ties. The result is that California's statutory scheme is, at least in part, at odds with notions of relative-placement.

Second, although California statutes [6] obligate

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6. *California Welfare and Institutions Code section 281.5* provides that "[i]f a probation officer determines to recommend to the court that a minor alleged to come within Section 300, 601, or 602 should be removed from the physical custody of his parent or guardian the probation officer shall *give primary consideration* to recommending to the court that the minor be placed with a relative of the minor, if such placement is in the best interests of the minor and will be conducive to reunification of the family." (emph. added).

Welfare and Institutions Code section 319 provides that at a hearing into the initial *detention* of the minor, the court shall, *inter alia,* "determine if there is a relative who is able and willing to care for the child .... [T]he court may order that the minor shall be placed in the suitable home of a relative or in an emergency shelter or other suitable licensed place or a place exempt from licensure designated by the juvenile court or in an appropriate certified family home whose license is pending and

social workers to *investigate* placing children with relatives, the statutes confer no substantive rights in relatives, and are directory rather than mandatory even for *social workers.* Moreover, the statutes set out neither a timeframe for the processing of placement requests, nor a mechanism to enforce them. It is well recognized that there is a *procedural* component to any constitutional right to claim custody of a child, without which the bare "right" to custody is worthless. *E.g., Stanley v. Illinois* 405 U.S. 645 (1972). California's ostensible "preference" for relative-placement lacks this procedural component. Relatives must *petition* for placement, which requires them to shoulder the burden of proving that the change

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...Continued...

all the prelicense requirements for such placement have been met as set forth in subdivision (e) of Section 361.2 for a period not to exceed 15 judicial days."

Welfare and Institutions Code section 361.3 provides that "(a) In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative. In determining whether such a placement is appropriate, the probation officer and court shall consider the ability of the relative to provide a secure and stable environment for the child. Factors to be considered in that assessment include, but are not limited to, the good moral character of the relative; the ability of the relative to exercise proper and effective care and control of the child; the ability of the relative to provide a home and the necessities of life for the child; which relative is most likely to protect the child from his or her parents; which relative is most likely to facilitate visitation with the child's other relatives and to facilitate refunification efforts with the parents; and the best interests of the child .... (c) For purposes of this section: (1) "Preferential consideration" means that the relative seeking placement shall be the first placement to be considered and investigated. (2)"Relative" means an adult who is a grandparent, aunt, uncle, or sibling."

of placement is in the child's "best interests." *California Welfare and Institutions Code section 388.* Requiring relatives to *initiate* action and placing the burden of proof upon them inverts basic Constitutional requirements; it ought to be the *Department's* burden to prove relative-claimants "unfit." As a practical matter, few relatives will have the resources to mount such a petition, and fewer still will be able to meet, in the context of a change-of-placement petition, the vague requirements of satisfying the "best interest" test over the objection of "trained" social work professionals.

Finally, California has come to rely on the "psychological parenting" theory, *i.e.,* that the need of children for "permanency" necessitates that they *remain* where they have initially been placed if the placement has endured for more than a short period of time. Reliance on this theory is pervasive; it is even applied at stages of proceedings when no statute lists it as a criterion for placement of a child. E.g., *In re Baby Girl D.* 208 Cal. App. 3d 1489, 257 Cal. Rptr. 1 (1989)[7]. California courts preserve a *status quo* of foster care even in cases, such as the instant one, where relatives *promptly* and repeatedly claim custody of a dependent infant. *See, e.g., In re Jessica Z.* 225 Cal. App. 3d 1089, 275 Cal. Rptr. 323 (1990).

Unfortunately, the California experience appears to be typical rather than unique. A retiring New York family court judge, commenting on the law in *her* state, observed that "[p]ressures to seek continuity via adoption after a year or two in care combine with the natural inclinations of agency workers to identify with and work more closely with foster and pre-adoptive families, who are

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7. This petition is not the place to debate the merits of "psychological parenting" theory. Suffice it to say that it is highly controversial within the psychological community. *See,* gen., Symposium: *The Impact of Psychological Parenting on Child Welfare Decision-Making* 12 N.Y.Rev. L. and Soc. Change 485 *et. seq.;* (1984); *Smith v. O.F.F.E.R., supra,* 431 U.S. at 844, fn. 52.

chosen by agency personnel and are likelier to conform to the value system of agency workers. This leads child care agencies to be neutral or indifferent with respect to the biological family when strong agency support might lead to family reunification." Davis, *Use and Abuse of the Power to Sever Family Bonds* 12 N.Y. Rev. L. and Soc. Change 557, 567 (1984). Other commentary, [*see,* gen., *Symposium, supra,* 12 N.Y. Rev. L. and Soc. Change at 485], confirms that the California and New York experience is a nearly universal one.

This ought not to be. A decade ago, this Court rejected the notion that state-created foster families enjoy constitutionally protected "liberty" interests equal to those of parents or extended families. *Smith v. O.F.F.E.R., supra,* 431 U.S. 816; *see,* also, *Sherrard v. Owens* 484 F. Supp. 728 (W.D., Mich., 1980), *aff'd.,* 644 F.2d 542, *cert. den.,* 454 U.S. 828; *Kyees v. County Department of Public Works* 600 F.2d 693, 695 (7 Cir., 1979); *Drummond v. Fulton County Department of Family and Children's Services* 563 F.2d 1200, 1207, *cert. den.,* 437 U.S. 910 (5 Cir., *en banc.,* 1977); *Gibson v. Merced County Department of Human Resources* 799 F.2d 582 (9 Cir., 1986); *Backlund v. Barnhart* 778 F.2d 1386, 1389 (9 Cir., 1985). *O.F.F.E.R.* was decided at almost the same time as this Court *also* ruled that "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history," [*Moore v. East Cleveland, supra,* 431 U.S. at 505], required the extension of Federal Constitutional protection to extended families.

In no context do the rights of families matter more than in dependency-and-termination cases. Nowhere else are the consequences so final; the state so intrusive; or the march of events so rapid. If the rights of families are not clarified in the dependency context, they surely will be overlooked; for it is clear that, in dependency cases, the state has little time for families, and families have little power to command the attention of the state.

The instant case is illustrative. The Department had no reason to detain Cassandra from "fit" relatives in the first place, and it *certainly* had no grounds to delay returning the child to her family until the rights of the family were finally allowed to flicker out. Arguably, this

case may not be entirely typical, since this aggrieved family was unusually "fit" and asked for its child early and often. But in a broader sense it is all *too* typical. As indicated, the misuse of power by the state of California is not unique. Countless families throughout the nation are similarly afflicted, and the pain that *each* family experiences is surely awesome.

Petitioners seek certiorari so that this Court can clarify the substantive and procedural rights of near-relatives in dependency cases. Petitioners ask this Court to hold that such relatives, if "fit" to assume responsibility, have a constitutional preference for the custody of kin whose parents are unavailable to care for them. Such a preference cannot, of course, be asserted to the derogation of parents[8], but it ought to be durable against capricious decisions by social services departments who would deny custody to deserving blood-relations. Petitioners are not asking for social engineering; they are merely seeking clarification of a right older than the Constitution and interwoven in its every line.

The California Court of Appeal held here, that the state can, for no particular reason (and certainly not for a *compelling* one), permissibly delay relative-placement from birth through the conclusion of a dependency case, at which point "[t]he fact that ... [the state] had the opportunity at a previous time, to place the minor with relatives becomes irrelevant." This ruling stands the Constitution on its head. If such tragedies are to be avoided, the rights of extended families must be recognized and clarified so that the state cannot, as here, blithely wound them at

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8. For example, relatives have no right to request that a child be moved far from the parents, thereby interfering with the ability of the parents ultimately to reclaim their offspring, merely to insure that relatives get a chance at custody.

their core.

DATED: February __, 1992

Respectfully Submitted:

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Appendix One:

OPINION OF THE COURT OF APPEAL

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"NOT TO BE PUBLISHED IN OFFICIAL REPORTS"

COURT OF APPEAL
FILED:
September 27, 1991

No. A049823; S.F. No. 505770

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

In re CASSANDRA M., a Person Coming under the Juvenile Court Law;

_____/

CITY AND COUNTY OF SAN FRANCICSO DEPARTMENT OF SOCIAL SERVICES,
Plaintiff and Respondent,
v.
STANLEY M.,
Defendant and Appellant,
ABIGAIL M., et. al.,
Appellants,
JOYCE O., et. al.,
Respondents,

_____/

In re:
CASSANDRA M., No. A053099
On Habeas Corpus.

_____/

Stanley M., Abigail M., and Donald B. appeal from

a juvenile court order denying the Welfare and Institutions Code section 388[1] petition to place Cassandra M. in the home of Abigail M. and Donald B., adopting a permanent plan of adoption for Cassandra M., and authorizing the initiation of an action to declare the minor permanently free from parental control pursuant to Civil Code section 232.[2] Stanley M. has also filed a petition for writ of habeas corpus alleging ineffective assistance of counsel at the jurisdictional hearing. We ordered that the writ petition be consolidated with the appeal for purposes of oral argument.

FACTS

Although the record is replete with conflicting evidence, this court is bound by the established rule of appellate review that all factual matters will be viewed most favorably to the prevailing party. (*Nestle v. City of Santa Monica* (1972) 6 Cal. 3d 920, 925-926; *In re Albert*

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1. All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2. Although the trial court's order is nonappealable [section 366.25, subd. (j), we may treat the appeal as an extraordinary writ. (*In re Albert B.* (1989) 215 Cal. App. 3d 361, 371-373.)

We also reject the claim of Cassandra M.'s counsel that Abigail M. and Donald B. have no standing to appeal, since they are not "aggrieved" parties. It is imprudent to leave entirely to court-appointed counsel the choices that foster children are unable to make for themselves, especially in litigation in which all parties have sufficient attributes of guardianship that their views on the rights of the child should at least be heard. (See, *Smith v. Organization of Foster Families* (1977) 431 U.S. 826, 84, fn 44 [foster parents have standing].)

B., supra, 215 Cal. App. 3d at p. 375.) With this standard in mind, the following appear to be the pertinent facts.

Cassandra M. was born on September 3, 1988. At the time of her birth, her mother, Teresa S., was addicted to drugs and her father, Stanley M., was incarcerated in Illinois on a drug charge. Abigail M. is Cassandra's paternal aunt. She is married to Donald B. Although they both expressed interest in taking Cassandra, relative placement was initially considered inappropriate because of the infant's medical condition. Consequently, Cassandra was placed in the fragile infant special care program.

Cassandra was placed in the home of Evonne Eldridge when she was three weeks old. When she was approximately three months old she was moved to the home of Joyce and Dave O. At that time, Cassandra was still exhibiting signs of withdrawal. Cassandra, who has remained with Joyce and Dave, is now a normal child, with adequate verbal skills. She considers Joyce and Dave her mother and father. She also has three siblings.

According to Abigail's testimony, she first visited Cassandra within a day after she was born. Although Abigail indicated that she was opposed to foster care, she was told that because of Cassandra's medical needs it was important she be placed in a special mom's program where specially trained people could care for the child. The initial social worker also informed her that the placement was temporary, the moms in the program were not interested in adopting the babies and the children wouid be released between six to nine months when they were well. Abigail was led to believe that any attempt to oppose foster care would be fruitless.

Abigail visited Cassandra three or four times while the infant was living in Evonne Eldridge's home. When she was informed that Cassandra was being moved to another home, Abigail asked whether the baby could be placed in her home, but was told Cassandra still required specialized care. Although the home of Joyce and Dave was twice as far away as the first foster home, Abigail and Donald visited the minor once a month or once every five weeks. The couple wanted Cassandra to be placed in their home as soon as she was legally and medically eligi

ble.

On May 18, 1989, Abigail went to court expecting to attend a hearing. She believed the hearing concerned Teresa S.'s reunification efforts and she could express her interest in having Cassandra placed in her home at that time. A court officer informed her that the hearing had been continued. When she called the court officer the following day, he told her that Cassandra's placement would not be considered until the permanency planning hearing which would not be set for six months.[3]

Abigail took Cassandra to see Stanley in Illinois in July 1989. Stanley wanted Cassandra to be placed with Abigail and Donald. He was also concerned that his daughter be placed in a home where she could be exposed to Judaism, since his family is Jewish.[4]

In the late summer of 1989, Abigail spoke with Joyce about Cassandra's adoption. Although she was thinking about adopting Cassandra, Joyce was concerned about her age, the fact that her two natural children were almost grown and financial matters. Abigail was not opposed to the idea of the adoption by Joyce and Dave at that time. In October of 1989, Joyce advised Abigail that she had decided not to adopt Cassandra.

On November 8, Abigail met with Geraldine Dito-Peavey, the child welfare worker, to discuss Cassandra's placement. Abigail was not sure whether the best way to proceed was adoption or guardianship; she was concerned about Cassandra's inheritance rights to her father's and grandfather's estates, whether Abigail could

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3. On May 19, 1988, the social worker filed a status report indicating that Teresa S. had refused to comply with her reunification plan. Consequently, it was recommended Cassandra remain in out-of-home placement and a permanency planning hearing be held in November 1989.

4. Teresa S. is Catholic

obtain support payments from Stanley, and whether there would sibling rivalry between her daughter and Cassandra. Abigail also informed Dito-Peavey that if Joyce and Dave were definitely not interested in adoption and placement did not work out with Abigail and Donald, her friend, Carla Garrett, might be interested in adopting Cassandra.

However, on December 18, after Cassandra had spent time in their home, Abigail told Dito-Peavey she would definitely take Cassandra. Abigail was still concerned whether she should adopt or become the girl's guardian. Although there is a statutory preference for adoption, Dito-Peavey agreed there were strong reasons in this case for guardianship. That same week, Dito-Peavey told Abigail that Joyce and Dave had changed their minds and wanted to adopt Cassandra. Abigail informed the social worker she was adamantly opposed to an adoption by the foster parents and that she wanted the child.

Because the tension and hostilities between the parties were increasing, and because Joyce reported that the baby was reacting adversely to the visits, Dito-Peavey terminated Cassandra's overnight visits with Abigail and Donald. She felt that a tug-of-war and the routine shuttling around were not good for the minor.

When both the foster family and the relatives expressed their desire to adopt Cassandra, Dito-Peavey decided she needed an evaluation of the case. She contacted Dr. Toni Vaughn Heineman, gave her a brief overview of the case and indicated that she needed a recommendation. Dr. Heineman's report was essentially what led to Dito-Peavey's recommendation that Cassandra should be placed with Joyce and Dave.

Dr. Heineman, a clinical psychologist, saw Cassandra on three different occasions. At her foster home Cassandra was bouncy and bubbling. She related to Joyce and Dave as her parents. In contrast, she was more subdued and tentative at the home of her aunt and uncle. Dr. Heineman opined it would be very detrimental to remove the child from her foster home and place her

with Abigail and Donald. If she were not permitted to maintain her primary relationship with Joyce, she would be devastated and confused; this could affect her future relationships.

Dr. William Schwartzman, a psychiatrist, testified on behalf of Abigail and Donald. Although he had never met with Cassandra, he had reviewed the reports made by Dr. Heineman and Dito-Peavey. Dr. Schwartzman opined that if the attachment Cassandra presently had to her foster parents were broken, the child would not have any problems forming new attachments. He stated there were not prospective studies which showed that a child removed from a parent at 18 months would suffer long-term depression.

Based on this evidence, the trial court made the following findings: "None of the parties have offered any evidence that would compel the Court to make findings that the child can be returned to the parents and that reunification can be achieved within the next six months or within 18 months from removal.

"However, there is a dispute as to whether the child should be freed for adoption through a filing of a petition pursuant to Civil Code Section 232 and there is a dispute as to whether adoption is [an] appropriate plan or whether some other plan should be ordered by the Court. And there is a dispute as to where the child should be placed.

"The findings and orders of this Court are based upon the following findings of fact and conclusions of law[:] contrary to the relatives' assertion, they did not unequivocally present themselves as a placement for the child until December 1989.

"They presented themselves as possible placements, they expressed an interest in being a placement at some future time, they explored the possibility of accepting placement but they never unequivocally said they wanted the Department of Social Services to place the child with them until December 1989.

"In the meantime, the child was in the home of Joyce and Dave [O.] and during that time that Cassie was in their custody, they provided her with the physical and

psychological nurturing of parents.

"It's important to note that Abigail [M.] and Donald [B.] continued to explore placement for Cassie to include themselves and Carla Garrett through the end of Decmeber as they encouraged and cooperated and shared custody of Cassie during that month.

"And, again, it must be noted that Cassie remained in custody of the foster parents who, despite indecision about whether they would provide long-term adoptive care for Cassie, continued to provide her with the physical and psychological nurturing of parents."

The Court determined that Dr. Heineman's testimony was credible and persuasive, whereas Dr. Schwartzman's was unpersuasive. It also found that Cassandra had substantial emotional and psychological ties to Joyce and David, and it would be seriously detimental to remove her from the foster parents.

The court then ordered the dependency status renewed on behalf of the minor, that she remain in the care and custody of the Department of Social Services, that the permanent plan is adoption, that the city attorney initiate an action to declare Cassandra permanetly free from parental control pursuant to Civil Code section 232 adn that she be placed with the foster parents.

DISCUSSION

Motion to Terminate Dependency

The petition for dependency in this case was filed on September 16, 1988, pursuant to former section 300.[5]

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5. Former section 300 provided in relevant part: "Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court: (a) Who is in need of proper and effective parental care or control and who has

The only jurisdictional fact alleged as to the father was that he was incarcerated. At the December 1, 1988, jurisdictional hearing, Stanley M.'s attorney informed the court that his client was incarcerated, that he had a trial date set for February 1989, and that he did not want to admit the allegations. The court found a continuance would not be in the best interests of Cassandra and the allegation of incarceration was true; it then committed Cassandra to the care and custody of the Department of Social Services.

On January 1, 1989, section 300, subdivision (g) become operative. That subdivision provides in pertinent part that the juvenile court may adjudge any minor a dependent when "the minor's parent has been incarcerated or institutionalized and cannot arrange for the care of the minor."

In April of 1990, immediately preceding the permanency planning hearing, Stanley moved to terminate dependency on the grounds that 1) his incarceration was an insufficient basis to sustain the dependency petition and 2) he was not given adequate notice of the basis for the allegations against him. The Court denied the motion on the ground that section 300, subidivision (g) was not operative at the time the court assumed jurisdiction over the minor. Stanley contends the court erroneously denied the motion. We disagree.

We commence our analysis with the general rule that in the absence of a clear legislative intent to the contrary, statutory enactments apply prospectively. (*Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1193-1194.) However, the presumption of prospectivity may be rebutted by a showing that the legislative history or the context of the enactment provides a sufficiently clear indication that the Legislature intended the statute

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...Continued...

no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or who has no parent or guardian actually exercising such care or control."

to operate retrospectively. (*Id.*, at p. 1210.)

Stanley asserts the Legislature's intent that the statute should be retrospective is evidenced by California Rules of Court, rule 1439,[6] the remedial nature of the new statute, and the doubtful constitutionality of former section 300. The assertion must fail for several reasons.

First, it is the Judicial Council, rather than the Legislature, which promulgates rules of court. (*Cal. Const., art. VI, section 6.*) Consequently, the California Rules of Court are not evidence of legislative intent.

Second, the rule applies to dependency petitions which were filed prior to January 1, 1989, but the hearing is not held or completed until *after* January 1, 1989. Cassandra's dependency hearing was conducted prior to that date. Contrary to Stanley's assertion in his reply brief, the Judicial Council was not interpreting the statute; rather it was clarifying transitional procedures for those few cases where petitions were filed prior to, but could not be heard until after, the effective date of the statute. Accordingly, the rule has no application to the instant action.

Finally, the legislative history of Senate Bill No. 243, 1987-1988 Regular Session, indicates the Legislature's intent to make the statute prospective. The Legislative Counsel's Digest to the August 17, 1987, amendment to Senate Bill No. 243 stated: "Existing law, the Arnold-Kennick Juvenile Court Law, details the procedures for declaring a minor to be a dependent child of the juvenile court. Existing law also specifies procedures

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6. This rule reads in pertinent part: "If a petition filed before January 1, 1989, alleges the child is described in section 300 under the subdivision lettering then in effect and petitioner did not make separate allegations under newly revised section 300, and if the jurisdiction hearing is not held or completed until after January 1, 1989, . . ."

All further references to rules are to the California Rules of Court.

pursuant to which a child can be freed from the custody and control of a parent. [ ] This bill would make numerous changes concerning those procedures, including revising the grounds for the declaration of juvenile court dependency on and after July 1, 1988, and January 1, 1990, as specified; ..." However, the Legislative Counsel's Digest to the September 3, 1987, amendment to the bill altered the above-quoted July 1, 1988, date to January 1, 1989. Clearly, this negates a legislative intent to make section 300 retrospective.

Stanley also contends section 300, subdivision (g) applies to this case since the December 1, 1988, jurisdictional finding was not final until the time for filing an appeal had expired after the operative date of the new section 300. The contention is not only contradicted by rule 1439, it fails to recognize that jurisdictional findings are nonappealable. (*section 396; In re Jennifer V.* (1988) 197 Cal. App. 3d 1206, 1209; *In re Tracy Z.* (1987) 195 Cal. App. 3d 107, 112.)

Citing *In re Kelvin M.* (1978) 77 Cal. App. 3d 396, 402, Stanley claims that even under the provisions of former section 300, subdivision (a), the court's assumption of jurisdiction over the minor was void, since the statute requires "'notice *and* an opportunity to be heard.'" The claim is blatantly absurd. Although Stanley was incarcerated at the time of the jurisdictional hearing, he was represented by counsel at the jurisdictional hearing on December 1, 1988. At that time his counsel informed the court that Abigail and Donald could take Cassandra when the health providers permitted the baby to leave the frail care center. There is no factual basis for finding Stanley was deprived of the right to be heard.

Ineffective Assistance of Counsel

Stanley asserts he was denied effective assistance of counsel at the jurisdictional hearing. The thrust of Stanley's claim is that his attorney failed to present evidence and argue the availability of Abigail and Donald to provide care to Cassandra, thus obviating the necessity for the assumption of jurisdiction. He then faults counsel

for failing to request rehearing of the jurisdictional findings and / or filing an appeal. In his petition for a writ of habeas corpus, Stanley renews these assertions and additionally contends that counsel should have been aware of new section 300, subdivision (g).

There is a conflict in California law as to whether parents have a constitutional right to effective assistance of counsel in dependency proceedings. (*In re Jessica Z.* (1990) 225 Cal. App. 3d 1089, 1100; *In re Dawn L.* (1988) 201 Cal. App. 3d 35, 37, comparing *In re Ammanda G.* (1986) 186 Cal. App. 3d 1075, 1079-1080 [right to counsel in section 300 proceedings is statutory, not constitutional; thus ineffective assistance of counsel claim not cognizable] with *In re Christina H.* (1986) 182 Cal. App. 3d 47, 49-50 [due process right].) We need not resolve this conflict, since Stanley's claim is unsupported by fact or law.

Where an ineffective assistance of counsel claim is applied in dependency proceedings, the claimant must show both that counsel's representation fell below an objective standard of reasonableness for prevailing professional norms and that he was prejudiced. (*In re Jessica Z., supra,* 225 Cal. App. 3d at pp. 1100-1101.) Stanley has shown neither.

As previously mentioned, at the dependency hearing, Stanley's counsel informed the court of Stanley's desire that Cassandra be cared for by her aunt and uncle. The charge that counsel should have taken steps to determine independently Cassandra's medical condition and that Abigail and Donald could provide adequate care is mere retrospective rhetoric. Abigail testified that when she saw Cassandra at the hospital and at the home of Evonne Eldridge she was a "very, very sick baby ... and very needy of lots of specialized care and attention." Abigail stated that although she tried to visit at least once every other week, she could not visit more often since she had to take time off from work. This testimony alone evidences the fact that in December of 1988 Abigail was working and was neither capable nor willing to provide full-time care for a sick infant. If this evidence was not already known to Stanley's counsel at the dependency

hearing, it would not have benefited Stanley's case had it been known. With respect to counsel's lack of awareness of the new statute, we conclude that since the statute was only prospective Stanley was not prejudiced. Thus, we find no merit to Stanley's claim of ineffective assistance of counsel and deny the petition for writ of habeas corpus.

Continued Placement with Foster Parents

All family members challenge the denial of the section 388 petition to place Cassandra in the home of Abigail and Donald. Abigail and Donald emphasize constitutional concerns while Stanley stresses the statutory preference for children to be placed with relatives.

Citing such cases as *Stanley v. Illinois* (1972) 405 U.S. 645 and *In re Baby Girl M.* (1984) 37 Cal. 3d 65, Abigail and Donald claim Cassandra and they have a constitutional right to an extended family. They maintain that the rights of a biological family take precedence over those of a state-created foster family.

Stanley and *Baby Girl M.* both concern the rights of unwed fathers. In *Stanley,* the U.S. Supreme Court stated that the biological father's interest in the children he has sired warrants deference and protection. (*Stanley, supra,* 405 U.S. at p. 651.) The court held that all parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. (*Id.,* at p. 658.) In *Baby Girl M.,* our Supreme Court held that in a Civil Code section 7017 proceeding to terminate the parental rights of a biological father, it was error to consider the best intereests of the child without first considering whether an award of custody to the father would be detrimental to the child. (*Baby Girl M., supra,* 37 Cal. 3d at p. 75.) The question with which we are here confronted is whether biological relatives are entitled to the same protection.

We begin our analysis with the observation that both *Stanley* and *Baby Girl M.* have been qualified by subsequent case law and statutes. For instance, in *Lehr v. Robertson* (1983) 463 U.S. 248, the high court held that

due process protection is provided when an unwed father exhibits a desire to commit to the child, not as a result of "the mere existence of a biological link." (*Id.*, at p. 261.) In 1986, the California Legislature amended Civil Code section 7071 with the intent to overrule *Baby Girl M.* (*Adoption of Christopher S.* (1987) 197 Cal. App. 3d 433, 438-439, fn. 4; but see *Jernstad v. McNelis* (1989) 210 Cal. App. 3d 528, 549 ["to the extent that ... *In re Baby Girl M.* rests on federal constitutional considerations it is not subject to being overturned by a legislative enactment"].) Under the new statute the custody rights of an unwed father, not presumed under Civil Code secton 7004, are to be determined by applying the best-interest-of-the-child test.[7] Thus, both federal constitutional law and the California statutory scheme have qualified the rights of natural fathers. These restrictions on the rights of unwed fathers lead to the conclusion that the constitutional rights of mere blood relatives are not as great as those of parents.

Moore v. East Cleveland (1977) 431 U.S. 494 and *Smith v. Organization of Foster Families, supra,* 431 U.S. 816, do not hold otherwise. In *Moore,* a grandmother challenged her criminal conviction under a zoning ordinance which limited occupancy of a dwelling unit to members of a single family. The ordinance defined "family" in such a way as to exclude Moore's grandchild

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7. Civil Code section 7017, subdivision (d)(2) provides in pertinent part: "If the natural father or a man representing himself to be the natural father claims parental rights, the court shall deterimine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed."

Stanley is not a presumed father within the meaning of Civil Code section 7004. Consequently, the standard set in Civil Code section 7017, rather than that in *Baby Girl M.* is applicable to him.

whose parent did not reside in the household. In reversing Moore's conviction, the court noted that decisions concerning child rearing, which are entitled to constitutional protection, have long been shared by relatives. (*Moore, supra,* 431 U.S. at p. 505.) In contrast, in *Smith,* foster parents challenged New York's statutory and regulatory procedures for removal of foster children from foster homes. Although the *Smith* court found it unecessary to determine whether foster parents asserted "liberty"[8] interests within the meaning of the Fourteenth Amendment, it noted the lack of a biological relationship in a foster family, whatever emotional ties may develop in a foster home had their origin in a contractual relation with the state, and any "liberty" interest in a foster parent was in derogation of the parent's "liberty" interest. (*Smith, supra,* 431 U.S. at pp. 838-847.) While the discussions in *Moore, Smith,* and other federal cases cited by appellants may lead to the inference that in particular situations relatives may have certain constitutional protections which are greater than those of foster parents, neither cases relates to the issue before us, *i.e.,* whether relatives have a greater constitutional right to custody of a minor than foster parents.

In determining the "liberty" interest that relatives have in the raising of children we are guided by *In re Albert B., supra,* 215 Cal. App. 3d at p. 377: "While parenting is a fundamental right [citation], minors also have rights. As such, parenting rights are not absolute. The interest of parents in maintaining their relationship with their children must be balanced with the interests of the child in secure and sufficient parenting. [Citation]." In choosing between the rights of parents and those of children, *Baby Girl M.* mandates a showing that parental

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8. Freedom of personal choice in matters of family life is one of the liberties protected by the due process clause of the Fourteenth Amendment. (*Smith, supra,* 431 U.S. at p. 842)

custody would be detrimental to the child before considering the best interest of the minor. However, this mandate dissolves with non-presumed fathers and any relationship other than that of parent and child. In short, a relative's right to raise a child other than his or her own does not rise to the status of a parent's right or the rights of the child. Accordingly, we find that Abigail and Donald have no constitutional claim giving them preferential rights to Cassandra.

Stanley contends the trial court erroneously found that the statutory preference for relative placement contained in sections 281.5[9] and 361.3[10] was no longer applicable and prematurely utilized section 366.25, subi-

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9. Section 281.5 provides: "If a probation officer determines to recommend to the court that a minor alleged to come within Section 300, 601, or 602, or adjudged to come within Section 300, 601, or 602 should be removed from the physical custody of his parent or guardian, the probation officer shall give primary consideration to recommending to the court that the minor be placed with a relative of the minor, if such placement is in the best interests of the minor and will be conducive to reunification of the family."

10. Section 361.3, subidivion (a) provides in relative [(sic)] part: "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative."

division (g)[11] to give preferential consideration to the foster parents' request for placement.

In determining that Joyce and Dave should be the adoptive parents, the court relied on *In re Baby Girl D.* (1989) 208 Cal. App. 3d 1489. In that case the minor was born addicted to heroin. Taken into protective custody at birth, the baby was declared a dependent and placed in a foster-adoptive home. At the permanency planning hearing, the court found that the mother had failed to comply with reunification requirements. Although the minor's maternal great-aunt and uncle requested relative home placement and the social worker's report found that their home was a suitable environment for the minor, the juvenile court directed the county counsel to initiate an action to declare the minor permanently free from the custody and control of her parents and continued placement with the foster parents.

The mother appealed, arguing that her aunt and uncle should have been afforded preferential treatment under sections 281.5 and 361.3. The Court of Appeal affirmed the lower court's ruling for the following reason: "The object of dispositional hearings is to find a temporary caretaker who will meet the child's physical and psychological needs while cooperating in reunification efforts. A relative, who presumably has a broader interest in family unity, is more likely than a stranger to be

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11. Section 366.25, subidivision (g) provides: "Notwithstanding any other provision of law, the application of any person who, as a foster parent, ... has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the foster parent and removal from the foster parent would be seriously detrimental to the child's well-being."

supportive of the parent-child relationship and less likely to develop a conflicting emotional bond with the child. [ ] However, once the juvenile court determines at a permanency planning hearing that reunification is no longer possible and that a child should be freed for adoption, there is no longer any reason to give relatives preferential consideration in placement. The overriding concern at this point is to provide a stable, permanent home in which a child can develop a lasting emotional attachment to his or her caretakers. It is for this reason that in any subsequent decision on adoptive placement, a foster parent to whom the minor already has 'substantial emotional ties' necessarily is entitled to preference over all other candidates. (section 366.25 subd. (g).)" (*Baby Girl D., supra,* 208 Cal. App. 3d at pp. 1493-1494.)

Stanley attempts to distinguish the present case from *Baby Girl D.* by noting that Abigail and Donald are Cassandra's aunt and uncle whereas the relatives in *Baby Girl D.* were the minor's great-aunt and uncle. Additionally, unlike the circumstances in *Baby Girl D.,* Abigail and Donald requested placement in their home at the time Cassandra was born and agreed to adoption prior to the permanent placement hearing. Citing *In re Terry E.* (1986) 180 Cal. App. 3d 932, 946-948, Stanley also maintains the Department of Social Services was at fault for delaying preferential placement with relatives.

Section 366.25, subdivision (g) mandates that once a permanent plan for adoption has been made, the best interest of the minor, which include preference for continuation of existing emotional bonding between the foster parents and the child, prevail. The fact that the Department ot Social Services had the opporunity, at a previous time, to place the minor with relatives becomes irrelevant once the permanent plan of adoption has been made.

DISPOSITION

The order is affirmed. The petitions for writ of

mandate and habeas corpus are denied.

WHITE, P.J.,

We concur:
MERRILL, J.
STRANKMAN, J.*

*Assigned by the Chairperson of the Judicial Counsel.
In re Cassandra M., A049823

App. 2

Supreme Court Filed: December 18, 1991

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
En Banc
ORDER DENYING REVIEW

1st District A049823, Div. 1; S023470

IN RE CASSANDRA M.,
a Person Coming Under the Juvenile Court Law;
_____/

CITY AND COUNTY OF SAN FRANCISCO, et. al.,
Respondents,
v.
STANLEY M., et. al.,
Appellants.
_____/

Petition for review DENIED.

DATED: December 18, 1991

Lucas, C.J.

(2)

No. 91-1396

Supreme Court, U.S.
FILED
MAY 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ABIGAIL RUTH MARSHALL
and DONALD BERGERSON,

Petitioners,

vs.

SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES; DAVID AND JOYCE OWEN; STANLEY MARSHALL; CASSANDRA MARSHALL,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
First District, Division Three

BRIEF OF RESPONDENTS SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES, DAVID AND JOYCE OWEN AND CASSANDRA MARSHALL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the California Supreme Court err in letting stand the state Court of Appeal's decision affirming adoptive placement of the minor, Cassandra M., with her foster family, based on the minor's best interests in the lasting emotional bond with the foster parents, over placement with petitioners, relatives who had never unequivocally presented themselves as willing to adopt Cassandra and who had only belatedly requested custody of the minor one year after she had been placed with the foster parents?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF CASE 1

SUMMARY OF ARGUMENT 5

REASONS THE PETITION SHOULD BE DENIED .. 6

I. PETITIONERS HAVE NEVER UNEQUIVOCALLY PRESENTED THEMSELVES AS AN ADOPTIVE PLACEMENT FOR CASSIE AND NEVER ASKED THAT CASSIE BE PLACED WITH THEM UNTIL ONE YEAR AFTER CASSIE WAS PLACED WITH THE OWENS 6

II. ADEQUATE CONSTITUTIONAL PROCEDURES TO DETERMINE WHETHER CHILDREN SHOULD BE PLACED WITH RELATIVES ARE AVAILABLE UNDER CALIFORNIA LAW AND WERE FOLLOWED IN THIS CASE 20

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Adoption of Baby Boy D., (1984) 159 Cal.App.3d 8 25

Collins v. Superior Court, (1977) 77 Cal.App.3d 47 25

In re Carmaleta B., (1978) 21 Cal.3d 482..... 25

In re Marriage of Carney, (1979) 24 Cal.3d 725 28

In re Albert B., (1989) 215 Cal.App.3d 361 .....25, 27

In re Angelia P., (1981) 28 Cal.3d 908..... 25

In re Eugene W., (1972) 29 Cal.App.3d 623..... 25

In re Lynna B., (1979) 92 Cal.App.3d 682 24

In re Micah S., (1988) 198 Cal.App.3d 557 25

Jermistad v. McNelis, (1989) 210 Cal.App.3d 528...27, 28

Moore v. City of East Cleveland, 431 U.S. 496 (1977) 26

Prince v. Massachusetts, 321 U.S. 158 (1944)..... 25

Smith v. Organ. of Foster Families for E. & Reform, 431 U.S. 816 (1977)..... 29

Stanley v. Illinois, 405 U.S. 645 (1972)..... 25

CALIFORNIA WELFARE AND INSTITUTIONS CODE

Section 252 4

Section 281.5 .....20, 21

Section 300..... 22

Section 300(a) 1

Section 309..... 20

TABLE OF AUTHORITIES – Continued

Page

Section 361.2(f) 27

Section 361.3 22

Section 361.5(a) 27

Section 366.25(g) 22, 24

Section 366.26(j) 24

Section 388 ..... 3, 4, 23

MISCELLANEOUS

Goldstein, Freud & Solnit, *Beyond the Best Interests of The Child* (1973) 23

R. Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Prob. (no. 3) 226 (1975) 28

STATEMENT OF CASE

Cassandra M. ("Cassie"), the minor who is the subject of this action, was born suffering severe drug withdrawal, the result of her natural mother's drug abuse during the pregnancy. Consequently, on September 19, 1988, the San Francisco Department of Social Services ("Department") commenced this action, filing a dependency petition pursuant to California Welfare and Institutions Code section 300(a).[1]

The San Francisco Juvenile Court sustained the dependency petition on December 1, 1988. The Juvenile Court declared Cassie a dependent child within the meaning of Section 300(a) and committed her to out-of-home placement. The Juvenile Court expressly found that placement with relatives was inappropriate due to Cassie's still fragile medical condition. Petitioners, Abigail Ruth Marshall and Donald Bergerson, Cassie's paternal aunt and uncle, did not appear at the hearing to seek custody of Cassie. (CT 22-23; RT1 9-11.)[2]

Dependency was renewed in August 1989, because Cassie could not yet be reunited with her natural parents.

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[1] All statutory references hereinafter will be to the California Welfare and Institutions Code, unless otherwise indicated. For the Court's convenience, the California Codes governing child welfare and dependency proceedings are discussed more fully below at pp. 20 through 24.

[2] References are to the Clerk's Transcript ("CT") and to the six volumes of Reporter's Transcripts ("RT") of San Francisco Juvenile Court proceedings below. The Reporters' Transcripts will be designated by volume number, as "RT1", "RT2", and so forth. Because the volumes were misnumbered (there are two numbered Volume 6 of 6), the volumes will be referred to as 1 through 6 for simplicity.

Neither petitioner appeared at the dependency status review hearing. (CT 27-38.)

In November 1989, the Department recommended a permanent plan of adoption for Cassie. The matter came before the Juvenile Court for permanency planning proceedings on November 16, 1989. In order to evaluate the Department's recommended permanent plan, on December 28, 1989, the Juvenile Court ordered *ex parte* independent assessments of Cassie's relationships with the Owens, Cassie's foster family, and with petitioners. (CT 41.)

In January 1990, petitioners appeared in these proceedings for the first time, with the filing of an application for modification of the Juvenile Court's December 1988 dependency order. Concurrently, petitioners requested an order granting them the status of "interested parties" and an order placing Cassie with them rather than with the Owens. (CT 54-59.) The Juvenile Court granted petitioners standing to proceed with the application to modify Cassie's placement pursuant to Welfare and Institutions Code section 388.[3] At the same

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[3] Welfare & Institutions Code section 388 provides:

> Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court for a hearing to change, modify, or set aside any order of court perviously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and

(Continued on following page)

time, based on the independent evaluation, the court found that Cassie's weekly weekend visits to petitioners' home were detrimental to her well being and consequently ordered the visits decreased to biweekly half-day visits. The court also ordered separate counsel appointed for Cassie. (CT 89; RT1 14-38.)

At a court-ordered settlement conference on March 1, 1990, the parties were unable to mutually agree on a permanent plan for Cassie. The court instead ordered the parties to submit the matter to mediation with a court-appointed counselor. Because the parties were too hostile to use the mediation process productively, the court set the case for trial on the recommended permanent plan and the Section 388 petition. (CT 92, 94-95, 98.)

The Juvenile Court commenced trial of the permanency planning and Section 388 proceedings on April 16, 1990. The court denied petitioners' pretrial motion to dismiss dependency and place Cassie immediately with petitioners. Then, on May 17, 1990, after hearing weeks of exhaustive testimony, the Juvenile Court denied petitioners' Section 388 application for modification, allowed

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(Continued from previous page)

shall set forth in concise language any change of circumstance or new evidence which are alleged to require such change of order or termination of jurisdiction.

If it appears that the best interests of the child may be promoted by the proposed change of order or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to such persons and by such means as prescribed by Section 386, and, in such instances as the means of giving notice is not prescribed by such sections, then by such means as the court prescribes.

Cassie to remain in the Owens home and ordered adoption as the permanent plan. (CT 210-232; RT6 197.) Commissioner Everett Hewlett, Jr., ruling for the court, found that, contrary to the assertions made by petitioners, they "never unequivocally said they wanted the Department of Social Services to place the child with them until December 1989." (Pet. at App.1, p. 6; RT6 191-192.) Commissioner Hewlett further found that the Owens had continuously provided Cassie with the physical and psychological nurturing of parents during the entire period she was in their home, despite their indecision about whether they would eventually adopt her. (Pet. at App.1, p. 7; RT6 192.)

The Juvenile Court later denied petitioners' application for rehearing of the Section 388 petition on the grounds that petitioners lacked standing to seek rehearing under Welfare and Institutions Code section 252. Petitioners appealed the denials of both the Section 388 petition and the rehearing. (CT2 1-23.)[4]

The California Court of Appeal affirmed the Juvenile Court's permanent plan for Cassie. The Court held that at the permanency planning stage of the dependency proceedings, the best interest of the minor, including the preference for continuation of the existing emotional bond between the child and the foster parents, prevails and any previous preference for placement with relatives becomes irrelevant once the permanent plan of adoption

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[4] Petitioners could not appeal from the permanency planning order. The order confirming the Department's recommended permanent plan of adoption and refering Cassie's case for initiation of proceedings terminating parental rights is a non-appealable order. Welf. & Inst. Code § 366.25(j).

is made. Appendix 1 to the Petition for Writ of Certiorari ("Pet.") at 17.

Petitioners' petition for review in the California Supreme Court was denied on December 18, 1991.

SUMMARY OF ARGUMENT

There are no sound reasons to grant the petition for writ of certiorari in this case. Contrary to the assertions made in the petition now before this Court, petitioners Bergerson and Marshall have never been ready, willing and able to unequivocally offer Cassie the stability and commitment of adoption into their family. This simple fact is amply supported by the record and informs the decisions of both the Juvenile Court and the Court of Appeal.

California law grants relatives a preference for placement in dependency proceedings up until the permanency planning stage. Petitioners here were not denied a preference. They simply came forward for Cassie too late.

From the time Cassie was removed from her natural parents, petitioners had numerous opportunities to present themselves to both the Department of Social Services and to the Juvenile Court to demonstrate a committment to adopt Cassie. They never did so. They affirmatively declined to take Cassie at birth, because of her extreme fragility and medical complications incident to her drug withdrawal. Later, they were concerned that Cassie would interfere with their relationships with their own two children. Then petitioners offered their friends, Carla and Tom Garrett, as adoptive parents for Cassie. Finally, petitioners proposed legal guardianship as a plan for Cassie, so that she would not lose inheritance rights to family land and so that she would not be a "rival" to their own children. Never did petitioners unconditionally offer to take Cassie in as their adopted child.

The trial court found, and the Court of Appeal affirmed, that petitioners had not even unequivocally presented themselves as a placement for Cassie until December 1989, after Cassie had been with her foster parents, the Owens, for a full year. The court-appointed expert, Dr. Toni Vaughn Heineman, found in March 1990 that, in Cassie's mind, Joyce Owen was her mother and David Owen her father. Indeed, from the beginning Joyce and David Owen, offered Cassie a loving and stable home, loved and cared for her as if she were their own child during her painful drug withdrawal and restored her to health and happiness. They want Cassie and have made an unconditional committment to adopt her.

In short, the facts underlying this case are not as presented by petitioners. The Juvenile Court did not deny petitioners any fundamental right. The court granted them standing as interested parties and permitted them to appear with private counsel and to pursue the Section 388 petition. The Juvenile Court based its decision to allow Cassie to remain with her foster family on the factual finding that Cassie's best interests were best served by permanent placement in the Owens' stable nurturing home. Nothing can change the fact that Cassie sees the Owens as her parents.

REASONS THE PETITION SHOULD BE DENIED

I. PETITIONERS HAVE NEVER UNEQUIVOCALLY PRESENTED THEMSELVES AS AN ADOPTIVE PLACEMENT FOR CASSIE AND NEVER ASKED THAT CASSIE BE PLACED WITH THEM UNTIL ONE YEAR AFTER CASSIE WAS PLACED WITH THE OWENS.

Petitioners present themselves to this Court as "fit near-relatives" who have been willing and waiting to take

Cassie into their home since the inception of this case. This is not so. In fact, during the four weeks Juvenile Court trial of the Section 388 and permanency planning proceedings, the only such portrayal of petitioners came from the testimony of petitioner Marshall herself. Because petitioners present such an incomplete depiction of the facts of the case and because this is a case about factual determinations, it is necessary to review some of the factual history of Cassie's case.

Born September 3, 1988, the only daughter of Teresa S. and Stanley M., Cassie was four weeks premature and exhibited severe drug withdrawal symptoms. She tested positive for cocaine, cocaine metabolites, codeine, morphine, methadone and methadone metabolites. At the time of Cassie's birth, Stanley was incarcerated in Illinois, having been arrested on federal drug charges. (Pet. at App.1, p. 3; CT 1, 3, 17.)

Cassie was placed first in the Fragile Infant Special Care ("Baby-Moms") foster home of Yvonne Eldridge. Then, in December 1988, Cassie was placed in the Baby-Moms home of Joyce and David Owen. Cassie has since continuously resided with the Owens, their two sons, Michael and Eric and another foster child, LaMar, who was also a fragile infant placed through Alameda County. (Pet. at App.1, p. 3; CT 17, 50-52; RT5 16-17.)[5]

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[5] The Baby-Moms program is a San Francisco program for infants suffering from severe drug withdrawal and other related medical complications. It is the only such program in the state. Its purpose is to identify children who have special needs, secure and train special foster parents for those children, provide and coordinate medical care and involve other programs according to the special needs of each child. (CT 16; RT1 44-45.)

Cassie was a child much in need of the Baby-Moms program. When she was placed in the Eldridge home, she exhibited signs of severe drug withdrawal, irritability, sweats and lack of coordination in feeding. She was hypertonic and difficult to console, sometimes crying for up to 20 hours a day. (CT 30; RT1 55-56.) When Cassie was placed with the Owens family three months later, she was still a difficult child, screaming for hours every day. She was rigid and would not make eye-contact. Her feeding was still uncoordinated. Cassie slept in Joyce and Dave Owens' bedroom due to her frequent night-waking. (Pet. at App.1, p. 3; RT6 22.)[6]

However, Cassie's condition improved drastically within the first month of her placement. By her first birthday, Cassie was a happy baby, just beginning to walk. She regularly went to bed without crying and slept through the night. She could make eye-contact with all of the Owens family members. (Pet. at App.1, p. 3; RT5 23.)

When Cassie was most medically fragile and in the Baby-Moms program, petitioners did not offer their home to her. Nor did petitioners or any other relatives come forward to offer Cassie a home at the time the Juvenile Court ordered out-of-home placement for Cassie. Nor did petitioners object when Cassie was placed in the Owens' home at the age of three months.

The record does not support petitioners' contention that Cassie's father "*arranged* for her care by asking his

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[6] Petitioners' suggestion that the Owens took in foster children "for money" is not only insulting, but it ignores the selfless commitment the Owens made to nurse and heal Cassie at a time when she was suffering and gravely ill, a commitment petitioners were not willing to make.

sister and her husband, petitioners here, to raise Cassandra on his behalf." (Pet. at 3) The only statement in the record that even approximates this assertion was made by an attorney for Stanley (Cassie's father) at the dispositional hearing in December 1988. (RT1 9.)[7] That statement is, of course, not evidence. Petitioners did not appear at the disposition hearing to offer Cassie their home. Moreover, when the Department's caseworker, Geri Dito-Peavey, contacted Stanley in January 1989 to ask whether he could offer a home for Cassie, he responded that he could not, because he was incarcerated. More importantly, he did not offer petitioners or any other relatives as a potential home for Cassie. (RT1 142-143.)

Petitioners contend that during 1989, they "repeated their request to raise Cassandra." (Pet. at 3.) This assertion is deceptive in the first instance because, in fact, petitioners never had made any request to raise Cassie. Petitioners cite, not the factual record, but only the Court of Appeal's opinion, for their assertion. In fact, no credible evidence was presented to the Juvenile Court, and that court found none, to support petitioners' claim that they had always sought to take Cassie. Rather, the factual evidence shows that in March and April of 1989, when Cassie's drug withdrawal symptoms had begun to abate, Ms. Dito-Peavey discussed with petitioners the possibility of placing Cassie in their home. Petitioners quote

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[7] The statement made by Stanley's attorney was:

> [Stanley] says that his sister and her husband *can* take Cassandra *when the social worker or the health providers say the baby can leave the frail care center she's in now.* (RT1 9.)

the record out of context when they state that the Department's case worker, Ms. Dito-Peavey, "dragg[ed her] feet" in placing Cassie with them. (Pet. at 3.) Ms. Dito-Peavey's testimony in fact was that in July 1989:

> . . . I talked to [petitioner] Abby about possible placement options. At that time, I know Abby had said, "Well, [Cassie's] at a crucial point in her skill. Maybe we would wait a little while until after her first birthday," and I went along with that to some extent, dragging my feet.
>
> We also talked about the procedure through the Department, that the matching committee would give me three adoptive homes and that Abby and I would sit down together and go over those homes. (RT2 404.)

Ms. Dito-Peavey also testified that petitioner Marshall had indicated wanting to be involved in the selection of Cassie's adoptive home. In early 1989 petitioner Marshall was visiting Cassie in her foster home approximately once every four to six weeks. At that time, Cassie appeared normal and healthy. However, petitioners did not express any interest in having Cassie in their home. (RT1 110-111, 147). Instead, petitioners consistently expressed concern that, having two children of their own, the economic and emotional burden of having another child in the home was too great. Petitioner Marshall was especially concerned about rivalry between Cassie and her own daughter, Alyse. (RT1 60, 78-79, 109; RT3 662-663.)

Far from desiring to have Cassie in her home, during July, August and September of 1989, petitioner Marshall discussed with Ms. Dito-Peavey the possibility, indeed their hope, that the Owens would adopt Cassie. (RT1 111.) Petitioner Marshall also communicated to Ms. Dito-Peavey that Stanley too supported the Owens adoption of Cassie. (RT1 129.) They all regarded the Owens home

very favorably and believed life with the Owens would be wonderful for Cassie. Petitioners even discussed paying support to the Owens for Cassie in the event the Owens adopted her. (RT1 61-62, 76-77, 111-129.) In July 1989, petitioner Marshall informed Ms. Dito-Peavey that she wanted Cassie in a home other than her own, one that would "spoil" her. (RT1 80, 110-111.) In short, at no time up to this point had petitioners ever offered Cassie their home.

At this same time, the Owens were considering adopting Cassie. According to Ms. Owen, her relationship with petitioners had been a good one prior to November 1989. Petitioners occasionally visited Cassie in the Owens home. Later they would pick up Cassie, take her out and return her a few hours later. (RT5 23-24.) Prior to December 1989, petitioners had never expressed to Ms. Owen any interest either in adopting Cassie or in becoming her legal guardian, although the three of them had several discussions regarding the possibility of the Owens adopting Cassie.

Ms. Owen recalled first considering adopting Cassie as early as July 1989, when she went on vacation without Cassie and truly missed her. The Owens began discussing adoption of Cassie in September 1989. She also recalled telling petitioner Marshall in September 1989 that she loved Cassie very much and was considering adopting her. On those occasions, petitioner Marshall responded that she was pleased and that the Owens' home was the kind of family she had hoped for for Cassie, because they lived in the suburbs, had children and were, importantly, a religious family. (RT 5 24-26.) Granted, the Owens too had reservations. They had two teenage children of their own, many financial responsibilities and another foster child. They were also concerned about starting over late

in life with young children. (RT1 75; RT5 27-29.) Nevertheless, the Owens continued to provide Cassie a loving and supportive home, where Cassie thrived.

Because of their concerns, in approximately October 1989, the Owens told Ms. Dito-Peavey that they could not adopt Cassie. One month later, in November 1989, petitioners for the first time expressed interest in having Cassie in their home but on "a trial basis." At the same time, they offered their friends, Carla and Tom Garrett, as a prospective adoptive home for Cassie. Petitioner Marshall felt that if Ms. Garrett, her best friend and former law partner, took Cassie in, petitioners could maintain contact with Cassie. (RT1 81-82.) It is apparent that petitioners wanted the benefit of a relationship with Cassie, when convenient for them and with none of the attendant responsibility.

In order to begin to move Cassie into a prospective new home, during December 1989, the Department allowed overnight visits to be arranged between Cassie and petitioners and between Cassie and the Garretts. (RT1 83.) There were two weekend visits and a longer visit. According to Ms. Owen, Cassie seemed fine and healthy when she left for the visits. However, Ms. Owen observed that after returning from visits, Cassie's behavior was changed. She screamed when she was put to bed, awoke screaming during the night and screamed when she woke up in the morning. Whereas before she had been a very independent little girl, she became "clingy" and whining, hanging onto Ms. Owen's leg and crying, calling out for her if separated from her for a moment. This was not Cassie's usual behavior. (RT5 30-32.)

Then, on December 15, 1989, the Owens informed Ms. Dito-Peavey that they had changed their minds and made a commitment to adopt Cassie. (RT5 28.) Since then,

the Owens have never waivered in their decision to adopt Cassie. (RT5 29.) Petitioners were fairly angry at this complication. They informed Joyce Owen that as Cassie's relatives, they were entitled to "a right of first refusal" of Cassie. (RT1 86-87.) However, at that point, petitioners still had not made any commitment to Cassie. During December 1989, petitioners indicated to the Department only that they preferred to have legal guardianship of Cassie, in order to retain rights to Cassie's inheritance and to avoid rivalry with their daughter, Alyse. (RT1 90-91, 112.)

Then, on December 28, 1989, Ms. Dito-Peavey received a letter from appellant Marshall asking, "for the record," that Cassie be placed immediately in their home. (RT1 91.) *This was the first time since Cassie's birth that petitioners had definitively requested that Cassie be placed in their home.* (RT3 671.) Petitioners gave no reason for their change of heart. It was Ms. Dito-Peavey's impression that they did not want to "lose" and simply wanted to prevent the Owens from having Cassie. (RT1 88-89, 182.)[8] At the same time, the Garretts announced that they would not adopt Cassie. (RT1 85, 92.)

Even at this critical stage, petitioners never indicated that they wished to adopt Cassie. They continued to ask only for legal guardianship over Cassie, essentially so

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[8] Petitioners' thinly veiled suggestion that the Owens were anti-Semitic and that Cassie's "Jewish ancestry" should dictate her placement with a Jewish family (Pet. at 4,) are unsupported by the record and are in any event irrelevant. In fact, Cassie's natural mother, Teresa, is Catholic. (Pet. at App.1, p. 4.) Therefore, under traditional Jewish law, Cassie is not actually Jewish. Moreover, nothing in the record suggests that either Stanley or Teresa have ever expressed to the Department any concern regarding Cassie's religious upbringing.

that they could tell Alyse that she had no "rival" and that they were only caring for Cassie because there was no other "suitable" home for her. (RT1 111-112.) Petitioners were also looking to the financial benefits to be had through enforcing child support obligations against Stanley, which would not be available were petitioners to adopt Cassie. (RT3 719.) Petitioner Marshall also contemplated giving Cassie to her friend, Carla Garrett, if petitioners were to become Cassie's legal guardians. (RT1 90.) For obvious reasons, the Department did not believe that petitioners had a strong committment to Cassie. (RT1 91.)

Because the hostilities between the parties were increasing and because Cassie was reacting adversely to the tug-of-war and routine "passing around" of the visits, Ms. Dito-Peavey terminated overnight visits with petitioners, with the concurrence of the Department's consultant, Dr. Alicia Lieberman. When the visits ceased, petitioners became still angrier and expressed feelings of betrayal. They showed no sympathy for Cassie's feelings and needs in the situation. (RT1 92-93, 95-96, 102.) However, Cassie returned to her normally happy, independent behavior after the overnight visits ceased. (RT5 32-33.)

In January 1990, the Department received correspondence from Cassie's mother, Teresa, asking that Cassie be placed with the petitioners. Teresa had up to that time consistently asked that Cassie not be placed with the petitioners because she, Teresa, did not get along with them and she believed they would not let her see Cassie. Teresa had felt that Cassie would be well taken care of by the Owens and she could visit her there. Ms. Dito-Peavey later learned that petitioner Bergerson had lied to Teresa, telling her that Cassie was abused and neglected by the Owens, in order to coerce her into changing her position. (RT1 112-114, 118-123.)

Because the custody dispute between the parties grew increasingly antagonistic, Ms. Dito-Peavey determined that an outside evaluation was necessary in order to establish a placement recommendation that served Cassie's long-term best interest. For that reason, Ms. Dito-Peavey engaged Dr. Toni Vaughn Heineman to evaluate Cassie's relationships with both petitioners and the Owens. (RT1 181, 206.) At that point, Ms. Dito-Peavey had not made up her mind concerning Cassie's placement. However, the Owens clearly loved Cassie and Cassie had thrived in their home. On the other hand, petitioners had come on the scene late, were ambivalent and had only committed to take Cassie in reaction to the Owens' decision. (RT1 62-63, 211-212.)

Dr. Heineman, an expert in child psychology with special expertise in attachment and child development issues, conducted the evaluation of Cassie's relationship with the Owens and with petitioners in February and March 1990. (RT1 244-245.)

Dr. Heineman testified that Cassie had a positive relationship with the Owens, who were clearly quite fond of her, were able to read all of her signals and responded appropriately to her needs. Cassie was "bouncy and bubbly" with them and looked to the Owens as her parents. (RT1 259.)

On the other hand, Dr. Heineman observed that Cassie was subdued and tentative with petitioners. She was "pleasant" to them but did not relate to them as her "parents." Observing Cassie in petitioners' home, Dr. Heineman noted that not only did Cassie not seek out petitioner Bergerson, she consistently and obviously avoided contact with him. (RT1 260-261, 343; Exhibit 2 at trial (4/17/90).) Dr. Heineman also saw Cassie with petitioners in her office. The doctor observed that Cassie was

not pleased to be left alone with petitioners. She was unhappy and "shut down" under the stress of the situation. By the end of the session with Dr. Heineman, Cassie had fallen asleep sitting between the petitioners on the couch. According to Dr. Heineman, this is not a normal way for children to behave and, under the circumstances, indicated that Cassie is not strongly attached to petitioners. (RT1 259-262, 278-279, 292-293.)

Based on her evaluation and observations, which the Juvenile Court found very credible, Dr. Heineman concluded that it would be "very, very detrimental" to Cassie to remove her from the Owens home and place her with petitioners. Dr. Heineman testified poignantly that Cassie would experience the move as if the Owens family left home one day and was killed in an accident. For Cassie, the whole Owens family and the family home would disappear. A child of Cassie's age and prior history of medical fragility would be devastated by such a move. (RT1 263.)

According to Dr. Heineman, Cassie does not now have the capacity to understand that petitioners are her "relatives." (RT1 345, 349.) To move her to a new "family", merely because they were related, would betray Cassie's confidence in the world as a safe, reliable and predictable place. Moreover, Cassie would lose Joyce Owen, her psychological "mother." In the opinion of Dr. Heineman, this would cause Cassie to lose the ability to develop object constancy, that sense of "a parent" inside which would allow her to go into the world and feel secure. Moving Cassie, when there is no compelling need to do so, would also lead Cassie to develop attachment problems and would interfere with her later attempts to develop autonomy and independence. (RT1 284, 288.) Without this ability, Dr. Heineman concluded, Cassie will

be a very empty little girl and could become severely depressed. (RT1 263, 273-275, 338-339, 355-356.)

Dr. Heineman observed that what a child needs most is security, lasting relationships and the knowledge that parents are parents. Anything less than adoption involves a holding-back by a caretaker, a lack of commitment depriving the child of emotional definiteness. Consequently, Dr. Heineman recommended adoption as the most permanent and stable alternative for Cassie. (RT1 269, 271.)[9]

Ultimately, based on her own case involvement and on Dr. Heineman's evaluation, Ms. Dito-Peavey also concluded that adoption by the Owens best served Cassie's interests. Petitioners had consistently put their needs ahead of Cassie's and could not see what was best for her. (RT1 214-231.) Meanwhile, Cassie had been in the Owens' home for 18 months and had a good relationship with the Owens and her foster siblings. Cassie had a close and loving relationship with her foster brothers Michael and Eric. She also had a close relationship with LaMar, whom the Owens also intended to adopt. She was clearly attached to the Owens family. In contrast, Cassie did not have the same attachment to petitioners. (RT1 63-65.)

Moreover, through the Owens, Cassie also had contact with members of her natural mother's family. She

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[9] Petitioners' expert, Dr. William Schwartzman, admitted having no experience with issues of parent-child attachment, attachment disorder, nor any experience with children of Cassie's age. He based his opinion solely on information obtained from petitioners about the case. He had never spent any time with Cassie, had never met the Owens and had never seen Cassie relating to any of the parties. The Juvenile Court found Dr. Schwartzman's testimony "unpersuasive" and "not too credible." (Pet. at App.1, p. 7; RT4 passim; RT6 195.)

saw her mother, Teresa, her great-aunt and uncle, Maureen and Ron Willis and her great grandparents. She spent holidays with all of them at the Willis' home. Joyce Owen also threw a birthday party for Cassie on her first birthday and invited all her maternal relatives as well as petitioners "because they're Cassie's aunt and uncle." (RT5 34-36.) Nothing in the record suggests that petitioners will similarly provide Cassie with this important contact with her extended maternal family. Rather, the facts strongly indicate that petitioners would not honor or support Cassie's ties with her maternal family. (RT1 219, 223.) Petitioner Marshall's remarks to the Juvenile Court regarding Cassie's mother, Teresa - that "she existed" and that appellant "wouldn't compare her with mother Teresa despite her name" (RT3 630) - demonstrate not only a stunning lack of compassion and sensitivity, but also give the strongest possible indication that if allowed to have custody of Cassie, petitioners would negatively prejudice, if not actively thwart, Cassie's future relationship with her maternal relatives.

In this case, the evidence clearly demonstrates that what is best for Cassie is to remain in the stable loving home provided by the Owens. The Owens nursed her through her nightmare of drug withdrawal and provided her with the loving care to develop into a normal, happy, secure child. The Owens also provided her with contact with both of her parents and all of her relatives, maternal and paternal. Dr. Heineman, who saw Cassie with the Owens, concluded that Joyce and David Owen were Cassie's psychological "mother" and "father." They love her and want to make a home for her.

On the other hand, petitioners have never unconditionally offered their home as a permanent placement for Cassie. They have considered taking her in only out of a

sense of familial obligation, and only in reaction to the Owens' decision to adopt Cassie. Petitioners have never committed to adopting Cassie. To the end, petitioner Marshall involved her friend and former law partner, Carla Garrett, as a potential adoptive placement for Cassie. Ms. Garrett herself ultimately testified that she would not have committed to adopting Cassie if petitioner Marshall had wanted her. (RT3 836, 839.) Thus, they played a sort of "bait and switch" with Cassie and with the Department. Petitioner Marshall has been more concerned with Cassie's inheritance and with the emotional burden Cassie might place on their family, than in providing her with a stable, nurturing environment. (RT2 432-433, 676, 752.)

In short, this is a case decided on factual issues and does not rise to the level of a federal case, much less a case suitable for review by this Court. Even if, *arguendo*, petitioners, as relatives, can assert a constitutionally-based placement preference, petitioners in this case were consistently ambivalent and uncommitted. While this medically fragile child was developing a close, intimate and nurturing psychological relationship with her foster parents, petitioners were keeping their options open, including considering placement of Cassie with their friends, the Garretts. The record clearly demonstrates that despite opportunities to take Cassie, petitioners were unable or unwilling to make an unequivocal commitment. Therefore, petitioners are not in a position to claim that their constitutional rights, if any, were abridged. Nor does this case present a suitable or adequate record for determining the sensitive issue of whether relatives enjoy an absolute constitutional placement preference.

II. ADEQUATE CONSTITUTIONAL PROCEDURES TO DETERMINE WHETHER CHILDREN SHOULD BE PLACED WITH RELATIVES ARE AVAILABLE UNDER CALIFORNIA LAW AND WERE FOLLOWED IN THIS CASE

California child welfare laws set forth the procedural and substantive protections for children and families that come within the juvenile court dependency system in this state. The statutory scheme embodies a strong policy directing the Juvenile Court to make placement and permanency planning decisions that protect and promote the best interest of the child. Furthermore, the law requires that the court consider the placement of minors with appropriate relatives, consistent with the child's best interests and in a manner that promotes the physical and emotional well-being of the child.

Whenever a minor child is removed from his or her biological parents, the Juvenile Court and the Department first consider placing the child with available relatives. Welfare and Institutions Code section 309 requires that the Department of Social Services release the minor to the custody of the minor's parent, guardian *or responsible relative* unless one or more conditions exist. The conditions under which a child is not placed with relatives include (1) when the parent, guardian or relative is not able or willing to provide care for the minor, and (2) when detention is necessary for the protection of the minor and there are no reasonable means by which the minor can be protected in his or her home or in the home of a responsible relative. Welf. & Inst. Code § 309.

Welfare and Institutions Code section 281.5 requires the Department to give "primary consideration" to placing a child with relatives if the placement is in the

minor's best interests and will be conducive to reunification of the family.[10]

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[10] The California Court of Appeal gave careful attention to the standard set forth in Section 281.5 in *In re Baby Girl D.* (1989) 208 Cal.App.3d 1489. That case presents facts closely analogous to the instant case. In *Baby Girl D.*, the minor was born addicted to heroin. Taken into protective custody at birth, Baby Girl D. was declared a dependent and, at age three months, placed in a foster-adoptive home. At the permanency planning hearing, the juvenile court referred the case for termination proceedings, because the mother could not reunify with the minor. The mother appealed, contending that the trial court erred in not placing the child with the mother's aunt. The Appellate Court unequivocally rejected the mother's contention that the great-aunt deserved preferential consideration as a "relative" within the meaning of section 281.5 and 361.5 of the Welfare and Institutions Code. The Court also held that, even if the great-aunt were considered a "relative", she failed to timely intervene and request placement of the minor until permanency planning hearing, after the minor had bonded with the foster parents. The Court explains:

> "Section 281.5 requires the probation officer who is recommending removal of a minor from the physical custody of the parent to prefer placement with a relative, *if it is in the best interests of the child and conducive to reunification with the parent.* . . .
>
> The object of dispositional hearings is to find a temporary caretaker who will meet the child's physical and psychological needs while cooperating in reunification efforts. A relative, who presumably has a broader interest in family unity, is more likely than a stranger to be supportive of the parent-child relationship and less likely to develop a conflicting emotional bond with the child.
>
> However, once the juvenile court determines at a permanency planning hearing that reunification is no longer possible and that a child should be freed

(Continued on following page)

In this case, Cassie was removed from the custody of her mother at birth and placed in a fragile infant care home because of her medical problems as a result of severe drug withdrawal. At that time, petitioners did not request custody or object Cassie's detention in foster care.

Following the Juvenile Court's assumption of jurisdiction over a minor (Welf. & Inst. Code § 300), the court then determines the dispositional issues of whether to declare the minor a dependent child of the court, and if so, whether to place the child outside of the parents' home. If there is a recommendation of out-of-home placement, the Department and the court must give preferential consideration *to a request by a relative* for placement of the child with that relative. Welf. & Inst. Code § 361.3. Again, in this case, at the dispositional hearing on Cassie's placement in December 1988, neither petitioners nor Stanley, Cassie's father, made any such request for placement in petitioners' home.

At any time during the course of a dependency action, any parent "or other person having an interest in a child who is a dependent of the juvenile court" may,

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(Continued from previous page)

> for adoption, there is no longer any reason to give relatives preferential consideration for placement.
>
> The overriding concern at this point is to provide a stable, permanent home in which a child can develop a lasting emotional attachment to his or her caretakers. It is for this reason that in any subsequent decision on adoptive placement, a foster parent to whom the minor already has "substantial emotional ties" is necessarily entitled to preference over all other candidates.

Id., at 1493-1494, citing Welf. & Inst. Code § 366.25(g), emphasis added.

"upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court". Welf. & Inst. Code § 388. In this case, both petitioners and Stanley could have requested custody of Cassie at any time between December 1988 and December 1989, before commencement of the permanency planning hearing. However, not until January 1990, after the permanent plan had been made and after the Owens had committed to adopting Cassie, did petitioners finally ask for custody of Cassie. For a young child such as Cassie, petitioners' request came too late. Removal of Cassie from her foster family, with whom she had strong emotional ties the equivalent of a healthy parent-child bond, would have been psychologically, emotionally and developmentally devastating to Cassie.[11]

If a dependent child's natural parents do not complete the court ordered reunification plan within a twelve-month period, the Juvenile Court must then determine whether reunification services should be terminated and which permanent plan - adoption, guardianship, or

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[11] Child welfare experts agree that continuity of relationships, surroundings, and environmental influence are essential for a child's normal development. Since these factors do not play the same role in later life, their importance is often underrated by the adult world. However, it has clearly been shown that any change of the caretaking person for infants and toddlers further affects the course of their emotional development. These attachments, at young ages, are as thoroughly upset by separations as they are effectively promoted by the constant, uninterrupted presence and attention of a familiar adult. Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* (1973), pp. 33-35.

long-term placement - should be implemented for the child. Welf. & Inst. Code §§ 366.25; 366.26. The California legislature and courts have expressed a clear preference that after twelve months of out-of-home placement, if the parents are unable to reunify with the child, the child should be adopted by the person with whom he or she has resided since the original removal.

> Notwithstanding any other provision of law, the application of any person who, as a foster parent, including relative caretakers, has care for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the foster parent and removal from the foster parent would be seriously detrimental to the child's well-being. Welf. & Inst. Code §§ 366.25(g), 366.26(j).

It is noteworthy that Section 366.25(g) and 366.26(j) both refer to "relative *caretakers*," and not mere relatives. Clearly, the lawmakers recognize what the experts know – that the person with whom the child had resided and is bonded is the preferred permanent caregiver for the child.

Here, petitioners claim simultaneously that they, as relatives, have a fundamental right to custody of Cassie and that Stanley's fundamental right to bring up his child extends to his right to nominate fit surrogates. No court has ever so held. Petitioners do not suggest how the court is to reconcile the competing "rights" of the relatives and the parent. Nor do petitioners reconcile this unsupported proposition with the well-settled and paramount right of every child to be raised with love, emotional security and physical safety. See *In re Lynna B.* (1979) 92 Cal.App.3d

682, 699, citing *In re Eugene W.* (1972) 29 Cal.App.3d 623, 629.

Rather, petitioners argue that they have some constitutional right that should be accorded the same sanctity as a parental bond and that supersedes the child's best interests in this case. The law does not support any of petitioners' claims.

Instead, as petitioners themselves point out, the United States Supreme Court has recognized parental rights as fundamental in nature and of primary importance. See e.g., *Adoption of Baby Boy D.* (1984) 159 Cal.App.3d 8, 17, citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Dependency proceedings are instituted to protect the welfare of the child when parents abuse or otherwise fail to meet their responsibility. *Collins v. Superior Court* (1977) 77 Cal.App.3d 47, 52.

As the court explained in *In re Albert B.* (1989) 215 Cal.App.3d 361:

> While parenting is a fundamental right, . . . minors also have rights. As such, parenting rights are not absolute. The interests of parents in maintaining their relationship with their children must be balanced with the interests of children in secure and sufficient parenting.

Id., at 377-378, citing *In re Carmaleta B.* (1978) 21 Cal.3d 482, 489; *In re Angelia P.* (1981) 28 Cal.3d 908, 916-917. In dependency proceedings, "it is no longer open to question that the child's best interest must be paramount." *In re Micah S.* (1988) 198 Cal.App.3d 557, 565, conc. opn. of J. Brauer.

Just as parenting is not an absolute fundamental right, nor are the rights of an "extended family" absolutely guaranteed by the Constitution. While there are realms of family life which the State may not enter, *Prince v. Massachusetts*, 321 U.S. 158, 165-166 (1944), there are

also arenas, including family relationships, in which the state, as *parens patriae*, must involve itself. This case is an example.

Petitioners rely on various federal authorities for their argument that the extended family relationship must be accorded the same sanctity as a parental bond. In fact, none of the authorities cited by petitioners stand for this proposition. Indeed, in the context of child welfare proceedings, the courts have uniformly declined to elevate the extended family over those psychological parent relationships which have proven to be in the child's best interests.

Most notably, petitioners cite to *Moore v. City of East Cleveland*, 431 U.S. 496 (1977) to support their position. Petitioners reliance on *Moore* is misplaced. In that well-known case, appellant Moore challenged her criminal conviction under an East Cleveland zoning ordinance which limited occupancy of a dwelling unit to members of a single family. However, the ordinance defined "family" in such a way as to exclude appellant's household consisting of herself, her son, and two grandsons, also first cousins. *Id.*, at 495. In reversing appellant's conviction, this Court held that "the choice of relatives in this degree of kinship to live together may not be lightly denied by the State." *Id.*, at 506-507. Significantly, this Court did not state that the configuration of extended families may never be regulated by the state. In fact, the court expressly held that the family "is not beyond regulation". *Id.*, at 500. Rather, when a government intrudes on choices concerning family living arrangements, the court must examine carefully the importance of the governmental interest advanced and the extent to which they are served by the challenged statute. *Ibid.* Such an examination was indeed made by the lower courts in this case.

The result of the courts' analysis was that Cassie's placement with her foster family was in her best interests and was therefore upheld. Even after the weeks of testimony at the Section 388 and permanency planning hearing, as well as the subsequent appellate review, the lower courts found, based upon substantial evidence, that Cassie's psychological, emotional and developmental needs were promoted by her continued placement with the Owens, not by placement with petitioners.

Furthermore, contrary to petitioners' claims, neither the courts nor any state lawmakers have interpreted *Moore* to convey on relatives an absolute right to "configure" an extended family by gaining custody of minors through the Juvenile Court. For example, in the case of *In re Albert B., supra,* 215 Cal.App.3d at 381, the appellate court held that grandparents had no right to "reunification" with a minor, nor did they have even an absolute right to visitation. Welf. & Inst. Code §§ 361.5(a), 361.2(f). What is paramount to child custody issues is the child's best interests.

Petitioners also object that the best interest standard is vague. What petitioners term "vagueness" is instead a flexibility that each court must have in order to make informed decisions concerning a minor's welfare based on the particular facts before it. That flexibility does not invalidate the standard as an appropriate means of evaluating the minor's placement. Rather, as the court explained in *Jermistad v. McNelis* (1989) 210 Cal.App.3d 528, 553:

> The standard of best interest of the child has consistently been viewed as necessarily conferring upon the trial court a large measure of discretion in assigning custody between parties competing on an "equal footing." (See, e.g., 6

> Witkin, Summary of Cal.Law (8th ed. 1974) Parent and Child, sec. 72.) This stems from the subtle task at hand. The best interest of the child is in being raised by the best parent. But that is not a matter that can be ascertained by crude calculation. "[The] essence [of parenting] lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adult's own experience of life; its motive power is parental love and concern for the child's wellbeing; and its teachings deal with such fundamental matters and the child's feelings about himself, his relationships with others, his system of values, his standards of conduct, his goals and priorities in life."

Id., at 553, quoting *In re Marriage of Carney* (1979) 24 Cal.3d 725, 739.

Although the court in *Jermistad, supra*, was speaking in the context of a domestic relations custody dispute, the principles are equally applicable in the juvenile court context. Custody of a child cannot be governed by absolutes, despite appellants' wishes that it be so. Child law authority Robert H. Mnookin articulately described the court's dilemma in such cases:

> When a judge must resolve a custody dispute, he is committed to making a choice among alternatives. The very words of the best-interest-of-the-child principle suggest that the judge should decide by choosing *the alternative that "maximizes" what is best for a particular child.*

R. Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Prob. (no. 3) 226, 255-268 (1975), emphasis added.

Finally, petitioners presume that foster families have no constitutionally protected liberty interest equal to those of parents or extended families. In discussing whether foster families have a constitutional right to

procedural protection, even at the expense of natural parents' rights, this Court has stated:

> We deal here with issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing. In such a context, restraint is appropriate on the part of courts called upon to adjudicate whether a particular procedural scheme is adequate under the Constitution.

Smith v. Organ. of Foster Families for E. & Reform, 431 U.S. 816, 855-56 (1977).

A fortiori, this Court should exercise even greater restraint when balancing the lesser interests of non-parental relatives against *both* the rights of foster parents, who have become the minor's psychological parents, and the best interests of the minor herself. California statutes and case law are more than adequate to protest the interests of non-parental relatives. In this area of "unusual delicacy" entailing subtle "professional judgments," *Smith v. OFFER, supra*, at 855-56, no reason exists to graft onto California procedural law an absolute and unlimited constitutional custody preference for relatives.

CONCLUSION

In this case, the factual record clearly demonstrated that what is best for Cassie is to remain in the stable loving home provided by the Owens. It was the failure by the petitioners to come forward and assert their interest in custody of Cassie, prior to the permanency planning hearing, that led to the situation that petitioners seek to put before this Court. This case does not entail any failure of California law to protect the rights of parents, children, and their families. The issues in this case revolve around the factual determinations made by the lower courts as to the petitioners' lack of willingness to offer Cassie a home before she had bonded to her foster parents. Accordingly,

there are no issues in this case which would warrant hearing by this Court on the petition for certiorari.

DATED: May 15, 1992

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No. 91-1396

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABIGAIL MARSHALL, *et. al.*,

Petitioners,

vs.

DEPARTMENT OF SOCIAL SERVICES, *et. al.*,

Respondents.

Petition for a Writ of Certiorari to the
Court of Appeal for the State of California
First District, Division Three

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

I) This Case, Accurately Summarized in The Petition, Presentes Important Constitutional Questions on a 'Clean' Record 1

(A) The Opinion of the Court of Appeal Comports With Petitioners' Statement of Facts 2

(B) Respondents' Allegation That Petitioners Initially Failed To Request Custody Is Contradicted By the Record 3

(C) Respondents' Remaining 'Factual' Quibbles Are Irrelevant to the Question of Granting Certiorari 4

(D) Respondents' Statement of Facts Underscores The Importance of the Due Process Claim Posed in Question 4 of the Petition 6

II) Respondents' Substantive *Legal* Arguments Are Without Merit 7

TABLE OF CASES

In re Albert B. 215 Cal. App. 3d 361 8
In re Baby Girl D. 208 Cal. App. 3d 1489 7,8
Moore v. City of East Cleveland 431 U.S. 496 8
Santosky v. Kramer 455 U.S. 745 7

No. 91-1396
IN THE SUPREME COURT OF THE UNITED STATES
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ABIGAIL MARSHALL, *et. al.*, Petitioners,
vs.
DEPT.OF SOCIAL SERVICES, *et. al.*, Respondents.

REPLY TO BRIEF IN OPPOSITION

I
THIS CASE, ACCURATELY SUMMARIZED IN THE PETITION, PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS ON A 'CLEAN' RECORD

Respondents argue that "this is a case decided on factual issues and does not rise to the level of a federal case." (Oppos. at 19) In furtherance of this claim, respondents accuse petitioners of misrepresenting facts, and proffer facts of their own which depict petitioners as insensitive and self-absorbed.

Respondents' portrayal of this case as no more than a messy factual dispute should not dissuade this court from granting certiorari. The fact statement in the petition was not one-sided, but tracked the opinion of the Court of Appeal. Moreover, the *record* contradicts respondents' one *material* claim (that petitioners waited a long time to request custody). The remainder of respondents' factual assertions, while unflattering, were not material to the decision of the trial and appellate courts. Finally, respondents' brief illustrates how cases like this can become infected by *ad hominem* attacks which would not be possible were the rights and options of relatives more clearly established in cases such as this; this need for definition is a reason to *grant* certiorari, rather than to deny it.

It should be borne in mind that the important constitutional issues at stake in this case *definitionally* arise in controversies over child custody, which by their nature provoke strong emotions and yield conflicting testimony; the factual complexities of this case are therefore not unique, but typical, and it would be a cruel irony were this Court to permit heartache in similar *future* cases by declining to decide *this* one[1].

(A)
The Opinion of the Court of Appeal Comports
With Petitioners' Statement of Facts

Petitioners based the fact statement in their certiorari petition on the opinion of the Court of Appeal. It is difficult to comprehend why respondents find this objectionable[2], since that opinion was avowedly written to view "all factual matters ... most favorably to the prevailing party." (Pet. Cert. App. 1 at 2) If the appellate opinion confirms petitioners' version of events, it is not because it was "slanted," but because it was faithful to the trial record.

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1. Respondents' brief overstates the factual complexity of the case by claiming it entailed four weeks of testimony. (Oppos. at 3, 7) In fact, the trial lasted over *portions* of 8 days, and the record of testimony is some 1,200 pages long.

2. Respondents scoff at petitioners for citing "not the factual record, but only the Court of Appeal's opinion, for their assertions," (Oppos. at 9), as if citing to an appellate opinion were somehow improper.

(B)
Respondents' Allegation That
Petitioners Initially Failed to Request
Custody Is Contradicted By The Record

Only one of respondents' attacks on petitioners is material to the outcome of this petition: respondents' often-repeated claim that, contrary to their representations, petitioners delayed considerably before requesting custody of their niece. (Oppos. at 4, 5, 8, 9, 13, 18, 19, 22-23, 29)

Respondents' claim is simply untrue. The first item in the record, a report prepared when Cassandra was but two weeks old, states that "Ms. Abigail Marshall and her husband, Mr. Bergerson, expressed interest [in taking custody of her]." (R. 3: par. 5) Further, (contrary to respondents' brief (Oppos. at 22)), the request *was* renewed at the time of "disposition" in December of 1988, where Cassandra's father's counsel represented that petitioner Bergerson "was here last time and has confirmed that he and Stanley's sister can take Cassandra when conditions permit."[3] The fact that the trial court concluded the proceeding by ordering a progress report on relative placement, (Tr. I:12), demonstrates that the court understood the relatives had requested placement[4].

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3. The "conditions" referred to were the Department's representations concerning Cassandra's health.

4. Respondents make the point that petitioners did not personally appear at this and other early hearings in the case. (Oppos. at 1-2) Petitioners were not parties, and often had no *notice* of such hearings. Moreover, Abigail Marshall *did* appear, at yet another, subsequent hearing, to

(C)
Respondents' Remaining 'Factual'
Quibbles Are Irrelevant to
The Question of Granting Certiorari

Most of respondents' brief is dedicated to showing that petitioners' equivocated in requesting custody of Cassandra; explored alternative placements; and, in any event, acted out of selfish motives; the implication is that the facts (or petitioners) are too "impure" to merit review by this Court.

Page limitations prevent a line-by-line review of all of this material. Much of it consists of suggestive language[5],

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...Continued...

request custody, only to learn that the hearing was postponed. (Pet for Cert. App. 1 at 4)

5. Respondents employ a trick usage of the word "adopt." By loosely describing petitioners' desire to establish a *guardianship* over Cassandra as a refusal to *adopt* her, the reader is left with the inaccurate impression that petitioners never asked for *custody* at all. (Oppos. at 5, 13, 19)

Another example: respondents suggest that petitioners misrepresented that Cassandra was Jewish (Oppos. at 13, fn. 8) In fact, they claimed that *they* were Jewish and sought to raise Cassandra in her father's faith. (Moreover, Abigail testified that according to the tenets of *reform* Judaism, Cassandra is *indeed* regarded as Jewish 'through' her father). (Tr. 657-658)

A final example: respondents fault petitioners' psychiatric expert for never having evaluated Cassandra personally. In fact, he was prevented from doing so because respondents obtained an order barring such an examination. (Tr. 865-877)

hearsay[6], or is simply not borne out by the record[7] Much else consists not of 'facts,' but interprative asides made by the social worker at trial or introduced in this Court for the first time by respondents' counsel[8].

However, line-by-line refutation of respondents' claims is unecessary; none of the new 'evidence' in the the opposition brief is relevant to this Court's decision to grant certiorari. The *most* that can be inferred from respondents' statement of facts is that petitioners did not finalize their demand for custody until December of 1989, when Cassandra was fourteen months of age. (Oppos. at 13).

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6. Respondents suggest that petitioners clashed with Cassandra's mother. (Oppos. at 14) In fact, the mother did not appear at trial, and testimony in this regard was hearsay from the social worker who admitted that the mothers' sentiments went "back and forth." (Tr. I:123) Petitioners in fact, assisted the mother with drug rehabilitation at the outset of the case (R. 17) and took her into their home; the psychologist, Heineman, stated in her report to the court that the mother retained a good relationship with petitioner Bergerson. (R. Ex. 2)

7. For example, respondents claim that petitioners intended to curtail contact between Cassandra and maternal relatives; in fact, the maternal aunt (who otherwise testified *against* petitioners), testified that petitioners offered a visitation schedule, and petitioners testified they would allow complete and open access.

8. For example, respondents claim that visitation between Cassandra and petitioners was limited by court order because it was detrimental (Oppos. at 3); the record reflects no such order, and indeed, the court refused to make a ruling on the issue. (Tr. 38)

Respondents concede that a request by petitioners for placement, even as "late" as this, would have been timely (Oppos. at 23, 24); at trial, respondents' social worker conceded that petitioners had passed no deadlines in making their request. (Tr. I:178-179)

The defining moment in this case came when the foster parents *themselves* belatedly decided to adopt. When the state announced that it favored the foster family, the result was a classic contest between the claims of extended family members and the plans of state welfare workers. *This* contest plainly framed the constitutional issues raised by petitioners in this Court, and it is the outcome of *this* trial that petitioners ask this Court to review. That the record reveals even *earlier* demands by petitioners is but "icing on the cake"; and that petitioners may have, on occasion, displayed self-centeredness is irrelevant to the central fact of their custody request and its constitutional implications[9].

(D)
Respondents' Statement of Facts
Underscores the Importance of
The Due Process Claim Posed
In Question 4 of the Petition

The "objective" record in this case shows that petition-

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9. Petitioners are not conceding, of course, that they are the brutes portrayed by respondents; most of the perjorative testimony against them was contradicted by them and their witnesses. The *point* is that neither the perjorative testimony *nor* the contradictions are relevant to the constitutional claims made here; the perjorative testimony is just "dirt" respondents have heaped on petitioners in hopes that this Court will dislike them enough to deny relief.

ers requested custody of Cassandra early and often; it is the "subjective" record of uncorroborated 'impressions' by social welfare professionals which respondents cite in their brief to show otherwise. Ironically, far from militating against granting certiorari in this case, the availability of such subjective evidence militates in favor of doing so.

Reliance on subjective assessments of the "sincerity" of a request for custody is the inevitable byproduct of a regime which regards such requests *not* as the dispositive assertion of a *right,* but merely as one of the competing claims to be weighed by the welfare worker in determining a child's "best interest." Moreover, questions of custody are fated to turn on subjective impressions when there is no objective *procedure* for logging a request for placement. Indeed, the ease with which a disapproving social worker can disparage a placement request through perjorative 'assessments' of the motivations underlying it is illustrative of the "unusual ability to structure the evidence," [*Santosky v. Kramer* 455 U.S. 745, 763, fn. 3 (1982)], possessed by social welfare agencies in dependency cases.

In question four of their certiorari petition, petitioners asked this Court to explore the "minimum requirements of procedural due process" necessary to implement California's purported relative placement preference. The instant case demonstrates the practical importance of resolving that question.

II
RESPONDENTS' SUBSTANTIVE *LEGAL* ARGUMENTS ARE WITHOUT MERIT

Respondents' brief does not contain an elaborate legal discussion. Even so, respondents raise *some* points of law which merit reply.

1. Respondents argue that California's statutory scheme adequately protects relatives. (Oppos. at 20-22) Ironically, respondents cite to *In re Baby Girl D.* 208 Cal. App. 3d

1489, 257 Cal. Rptr. 1 (1989) as descriptive of the rights enjoyed by relatives. *Baby Girl D.* held that the sole occasion for placing a dependent child with a relative is to give it a *temporary* home while the parent works to recover custody. In the instant case, of course, there was no hope that Cassandra's father, who was in prison, could recover custody; by citing *Baby Girl D.,* respondents confirm petitioners' allegation that California law refuses to recognize any *independent* custodial rights accruing to extended family units in cases such as theirs.

2. In opposition to petitioners' reliance on *Moore v. City of East Cleveland* 431 U.S. 496 (1977), respondents argue that neither California "courts nor any state lawmakers have interpreted *Moore*" in accordance with petitioners' claims. (Oppos. at 27) If this is indeed an accurate statement of California law[10], it underscores the need for consideration of the question by this Court.

3. Respondents argue that the needs of children must be assessed in terms of their "best interests" rather than interms of the "absolute" rights of third parties. (Oppos. at 28) This argument wrongly assumes that family court judges have only two options: an unadorned "best interests" analysis or adherence to a rigid requirement that every child end up placed with relatives. Petitioners advocate a *third* course: recognition of clear but flexible rights in extended family units, a recognition that has already been extended, by *Moore, supra,* to the comparatively trivial area of zoning. Petitioners concede state power to "regulate" extended families; what the state does

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10. In support of their contention, respondents cite to *In re Albert B.* 215 Cal. App. 3d 361, 263 Cal. Rptr. 694 (1989), yet another California case disparaging the rights of near-relatives in dependency cases. This case illustrates, rather than refutes, petitioners' grievance against California law.

not have is the power to place children for adoption by strangers (as opposed to equally nurturing and enduring guardianship with relatives) merely because it is in their asserted "best interest" to do so. In short, petitioners advocate not "absolutes" but genuine flexibility which considers the long-range needs of both children *and* kin for the sense of 'place' and purpose that family bonds promote.

4. Respondents criticize petitioners for failing to "suggest how the court is to reconcile the competing 'rights' of the relatives and the parents." (Oppos. at 24) The short answer to this criticism is that petitioners never claimed any rights "against" the parents. The rights of extended families, like *any* rights, are asserted against the *state.*

5. Finally, running through respondents' entire brief are lyrical descriptions of Cassandra's emotional ties to the foster family with which she ended up after the relatives' early requests for placement were denied; respondents also dwell at length on the devastation that Cassandra (or *any* child) would suffer were those ties severed. (Oppos. at 15-17)

Petitioners would be the last to disparage the emotional needs of a child. Indeed, one reason that they sought custody of their niece was to endow in her that sense of emotional self-worth that only a sense of biological 'belonging' can bestow.

That continuity of relationships may be a primary requirement for proper child development, (Oppost. at 23, fn. 11), is the most important reason to place dependent minors with near kin at the *earliest possible* stage of the dependency process.

Concededly, the emotional bond of a child to an existing caretaker is an important factor to be considered in making a placement decision. What went amiss *here* is that such bonds were artificially vested in a foster family as the result of refusal by a welfare agency to recognize that relatives have important rights, and that these bonds were

the *only* factor considered by the trial court in making its placement decision once the relatives obtained leave to appear.

CONCLUSION

Any custody dispute is factually complex and, when the state is a party, derogatory observations by social workers can clutter the record considerably. Respondents seek to convince this Court that because such perjorative testimony was adduced here, this is a fact-based case unworthy of review. Not so. This is a typical case, unique only in that the record shows an early placement request by relatives and because the relatives are, despite respondents' perjoratives, *obviously* "fit," tenacious, and stalwart in their love for kin. This case is emblematic and representative of countless similar tragedies. It would only compound *all* such tragedies were this Court to deny review merely because respondents have continued to confuse the issues *here* just as they sought to do at trial.

This case comes to this court on a clean, clear record; the Court of Appeal had no trouble reaching the constitutional issues posed in this petition; the only criticism petitioners have of that Court is that it resolved the questions wrongly. The time has come for *this* Court to set matters right. Certiorari should be granted to settle a constitutional question of core importance to every American family.

DATED: May 21, 1992 Respectfully Submitted:

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